

**The Central Law Journal.**

ST. LOUIS, APRIL 23, 1886.

**CURRENT EVENTS.**

**DEATH OF JUDGE BAXTER.**—We regret to learn that Hon. John Baxter, Judge of the Circuit Court of the United States for the Sixth circuit, died suddenly at Hot Springs, Arkansas, on Sunday, the 4th inst. Prior to his elevation to the bench by President Hayes, Judge Baxter had held a very high position socially and professionally, and in all respects was one of the leading men in Tennessee. His private character was above all reproach, and his death is a great loss to his State, to the profession, and to the public service of his country:

**THE GRACE OF BREVITY.—A WORD TO OUR READERS.**—The parson's excuse for his long sermon that he had no time to make it shorter is the only one which can be rendered for most of the sins of the press, secular and professional. Like most other excuses it is bad at best. The newspapers boasting inordinately of their vast "acreage" of space fill it with a mass of verbiage that in justice to their readers should be "boiled down" to one tenth of its dimensions. For want of that process it is often unintelligible. For example, a gentleman in St. Louis, interested like most other people, in the strike troubles in East St. Louis, read a daily paper for half an hour, and then threw it down, declaring that it would be much easier to find out the facts by going across the river himself. Now, how is this? Whether the editors neglect their business, or the reporters are overworked, we cannot, of course, presume to say. It is certain, however, that nobody connected with the daily press seems to have time to make things shorter, and that everything sadly needs to be made shorter.

Now, what does this lead to? To the fact that the legal profession, like the general public, is overwhelmed with a vast mass of unnecessary printed matter, and it needs the relief of diligent and faithful condensation.

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The decisions of all the courts of last resort, State and Federal, are reproduced in many different publications, and in the Federal Reporter, and in some others, are also printed decisions of courts that are not of the last resort. All the cases in all these publications, important and worthless, are massed together, without even a pretence of classification, selection or arrangement, and obviously, so great a body of legal matter, to be made available for use, imposes upon the practitioner much more labor than he can conveniently bestow upon it.

Now it is very well for a lawyer to subscribe for that "Reporter" which purports to give all the rulings of the highest court of his own State; if he endeavors to keep up with all of the periodical Reporters, he will assuredly be overwhelmed with a mass of legal verbiage, in which the actual, available, practical law is in about the proportion of the proverbial grain of wheat in a bushel of chaff. And taking that Reporter, he should also take the CENTRAL LAW JOURNAL, in which he will find whatever is of greatest value in all the others diligently boiled down, condensed, carefully arranged, and presented in such a form as to be available at once.

The task which we propose to ourselves, and which, with the aid of our able and trained corps of contributors, we have hitherto performed, is to sift out from the undigested mass of current law, whatever will be valuable to our readers, and to present it, carefully annotated, when necessary, in such a shape as to be available at once. That this has been done in the past will be obvious upon an inspection, however cursory, of our twenty-one volumes; that it will be done hereafter, can well be expected upon the accepted principle that it is safe to judge the future by the past.

**NOTES OF RECENT DECISIONS.**

**CONSTITUTIONAL LAW.—INTER STATE TRAVEL.—TAXATION.**—Questions of inter-state commerce and travel seem to be interminable. Settled as they may be by broad and far-reaching decisions, they soon reappear in some new shape presenting new conditions and involving different interests from those which

had been previously adjudicated. The most recent ruling of the Supreme Court of the United States involves the constitutional right of Tennessee, to tax sleeping cars which traverse the State.<sup>1</sup> The facts were, in short, that the State imposed a privilege tax of fifty dollars per annum on each car of that description, not owned by a railroad company, in which passengers were transported for hire. It was conceded on the one hand that the State had a right to lay the tax upon the cars of a corporation having a domicile in the State, and upon cars which operated wholly within the State, and consequently had a *situs* within it; and on the other, that the corporation in question had no such domicile, and that the cars taxed, run into, and out of, or through the State, and consequently had no legal *situs* in it. The court decided that the State of Tennessee had no constitutional power to levy a tax upon cars so used, and that the imposition of such a tax was a regulation of inter-state commerce, which under the constitution of the United States, can only be made by congress.

The charge for mere transportation, and that for the especial accommodations are to be regarded as inseparable; consequently, a tax upon the sleeping car, based wholly upon the comforts it affords, the coach, mattress, pillows etc., is nevertheless as much a tax upon the transportation as it would be if the transit were accomplished in a box car. It is immaterial, if passengers are carried from Alabama through Tennessee into Kentucky, whether they enjoy the special comforts of a sleeper or not, in either case the transportation with all its incidents is inter-state travel, and the vehicle in which it is accomplished is exempt from taxation by the State, unless it has jurisdiction over its owner by reason of his domicile or citizenship.

The point is not new, except that it is the vehicle upon which the tax is laid, not the person or thing carried. It has been repeatedly held that a State cannot lay a tax on the transportation of goods from one State to another.<sup>2</sup> Incidentally, in deciding the State

freight tax case,<sup>3</sup> it was said, that a State can not tax persons passing through, or out of it, and that a tax upon the transportation of passengers is a tax upon the passengers themselves. The ruling now under consideration goes one step further and holds that a tax upon the means and appliances by which the transportation of passengers is from one State to another, effected is a tax upon the passengers themselves, and therefore within the constitutional prohibition. This ruling seems to settle the last of the questions which relate to the right of a State to tax inter-state commerce or travel, or the means and appliances used in such commerce or travel. There is a bare possibility that, hereafter, a case may arise in which it will be necessary for the Federal Courts to decide what is such a legal *situs* of personal property within a State, as will authorize its taxation, although under the principles of this case exempt from such taxation. To put an extreme case; if a sleeper passes into a State early in the morning, and out of it at night fall, and returning almost immediately, traverses the State again at night, thus operating nearly all the time within the State, but having both terminal points of its route beyond its limits; has such a car a legal *situs* within that State that will subject it to taxation? Whether a State has the right to settle the period of residence, so to speak, of personal property within its borders, which will authorize its taxation, is another possible question, if its rule on that subject should be applied to property used in inter-state commerce.

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ACCOUNT STATED—PARTIES — ESTOPPEL —  
USAGE OF BUSINESS—BANK AND DEPOSITOR—  
FORGERY—VIGILANCE.—The Supreme Court of the United States have recently decided a question of commercial law worthy of something more than a passing notice.<sup>4</sup> The case briefly stated is this: An account was kept by the plaintiff with the defendant, a National Bank. The confidential clerk of the plaintiff attended to all the details of the business, filled up the checks, made the proper entries

<sup>1</sup> Pickard, Comptroller etc. v. Pullman etc. Co., S. C. U. S. March 1, 1886, Sup. Court Rep. p. 635.

<sup>2</sup> Almy v. State, 24 How. 169; Woodruff v. Parham, 8 Wall. 123, 138; Crandall v. Nevada, 6 Wall. 35.

<sup>3</sup> 15 Wall. 232,

<sup>4</sup> Leather etc. Bank v. Morgan, S. C. U. S. March 1, 1886. Sup. Ct. Rep. Vol. VI. p. 637.

on the stubs, and brought the checks to his employer for his signature. This routine was followed for several years, until the clerk being dishonest, began to raise the checks after after his employer's signature had been affixed, making such alterations in the stubs and the general books of the concern as would, he hoped, prevent or delay detection. In this manner in the course of four months he obtained over \$10,000, so that when the discovery came, the bank admitted that it owed its depositor \$141,91, when he claimed and recovered judgment in the circuit court for \$10,741,09. According to usage in such cases, the pass-book of the depositor was balanced and returned with the vouchers, and the clerk destroyed all but two of the raised checks. The plaintiff had been careless in his examination of the pass-book and returned the checks, and the consequence was, that he was not aware of the crime of his clerk, until the amount abstracted exceeded ten thousand dollars.

Upon this state of facts the circuit court directed a verdict for the plaintiff, upon the ground that the plaintiff "was under no duty whatever to the bank, to examine his pass-book and the vouchers returned with it, in order ascertain whether his account was correctly kept. For this reason it is contended the bank, even if without fault itself, has no legal cause of complaint, although it may have been misled to its prejudice by the failure of the depositor to give timely notice of the fact—which, by ordinary diligence, he might have discovered on the occasion of the several balancings of the account—that the checks in question had been fraudulently altered."

This ruling, the Supreme Court holds to be inconsistent with the relations of the parties, and with the principles of commercial law. It says:

"While it is true that the relation of a bank and its depositor is one simply of debtor and creditor,<sup>5</sup> and that the depositor is not chargeable with any payments except such as are made in conformity with his orders, it is within common knowledge that the object of a pass-book is to inform the depositor from time to time of the condition of his account as it appears upon the books of the bank. It

not only enables him to discover errors to his prejudice, but supplies evidence in his favor in the event of litigation or dispute with the bank. In this way, it operates to protect him against the carelessness or fraud of the bank. The sending of his pass book to be written up and returned with the vouchers is therefore, in effect, a demand to know what the bank claims to be the state of his account; and the return of the book, with the vouchers, is the answer to that demand, and, in effect, imports a request by the bank that the depositor will, in proper time, examine the account so rendered, and either sanction or repudiate it. In *Devaynes v. Noble*,<sup>6</sup> it appeared that the course of dealing between banker and customer, in London, was the subject of inquiry in the high court of chancery as early as 1815. The report of the master stated, among other things, that for the purpose of having the pass-book 'made up by the bankers from their own books of account, the customer returns it to them from time to time as he thinks fit; and, the proper entries being made by them up to the day on which it is left for that purpose, they deliver it again to the customer, who thereupon examines it, and if there appears any error or omission, brings or sends it back to be rectified; or if not, his silence is regarded as an admission that the entries are correct.' This report is quite as applicable to the existing usage of the country as it was to the usages of business in London at the time it was made. The depositor cannot, therefore, without injustice to the bank, omit all examination of his account, when thus rendered at his request. His failure to make it, or to have it made, within a reasonable time after opportunity given for that purpose, is inconsistent with the object for which he obtains and uses a pass-book. It was observed in *First Nat. Bank, etc. v. Whitman*,<sup>7</sup>—although the observation was not, perhaps, necessary in the decision of the case,—that the ordinary writing up of a bank-book, with a return of vouchers or statement of accounts, precludes no one from ascertaining the truth and claiming its benefit. Such undoubtedly, is a correct statement of a general rule. Without impugning the general rule that an account rendered, which has become

<sup>5</sup> *Phoenix Bank v. Risley*, 111 U. S. 125, 127, S. C. 4 Sup. Ct. Rep. 322.

<sup>6</sup> 1 Mer. 531, 535.

<sup>7</sup> 94 U. S. 346.

an account stated, is open to correction for mistake or fraud,<sup>8</sup> other principles come into operation where a party to a stated account, who is under a duty, from the usages of business or otherwise, to examine it within a reasonable time after having an opportunity to do so, and give timely notice of his objections thereto, neglects altogether to make such examination himself or to have it made in good faith, by another for him; by reason of which negligence the other party, relying upon the account as having been acquiesced in or approved, has failed to take steps for his protection which he could, and would have taken, had such notice been given. In other words, parties to a stated account may be estopped by their conduct from questioning its conclusiveness."

Upon the application of the principle of estoppel to such cases the court says:

"The doctrine of estoppel by conduct has been applied under a great diversity of circumstances. In the consideration of the question before us, aid will be derived from an examination of some of the cases in which it has been defined and applied. In *Morgan v. Railroad Co.*,<sup>9</sup> it was held that a party may not deny a state of things which by his culpable silence or misrepresentations he has led another to believe existed, if the latter has acted upon that belief. 'The doctrine,' the court said, 'always presupposes error on one side and fault or fraud upon the other, and some defect of which it would be inequitable for the party against whom the doctrine is asserted to take advantage.' In *Continental Nat. Bank v. National Bank of the Com.*,<sup>10</sup> it was held not to be always necessary to such an estoppel that there should be an intention, upon the part of the person making a declaration or doing an act, to mislead the one who is induced to rely upon it. 'Indeed,' said Folger, J., 'it would limit the rule much within the reason of it, if it were restricted to cases where there was an element of fraudulent purpose. In very many of the cases in which the rule has been applied, there was no more than negligence on the part of him who is estopped. And it has long been held that where

it is a breach of good faith to allow the truth to be shown, there an admission will estop. *Gaylord v. Van Loan*, 15 Wend. 308.' The general doctrine, with proper limitations, was well expressed in *Freeman v. Cooke*,<sup>11</sup> and in *Carr v. London & N. W. Ry. Co.*<sup>12</sup> In the first of those cases it was said by Parke, B., for the whole court, that 'if, whatever a man's real intention may be, he so conducts himself that a reasonable man would take the representation to be true, and believe that it was meant that he should act upon it, and did act upon it as true, the party making the representation would be equally precluded from contesting its truth; and conduct, by negligence or omission, when there is a duty cast upon a person by usage of trade or otherwise to disclose the truth, may often have the same effect.' And in the other case, Brett, J., speaking for the court, said: 'If in the transaction itself which is in dispute, one has led another into the belief of a certain state of facts by conduct of culpable negligence, calculated to have that result, and such culpable negligence has been the proximate cause of leading, and has led, the other to act by mistake upon such belief to his prejudice, the second cannot be heard afterwards, as against the first, to show that the state of facts referred to, did not exist.'"<sup>13</sup>

The court after an exhaustive review of the authorities and the facts, arrives at these conclusions: 1. That upon an account stated, parties may be estopped by their apparent acquiescence; 2. that it is the duty of a depositor in a bank upon the rendition to him of his account stated in his pass-book, to make promptly a diligent examination of the book and checks returned, and to report at once any errors that he may discover; 3. that whether the plaintiff is estopped by his negligence in this respect, or whether the bank exercised due caution before paying altered checks, are mixed questions of law and fact and proper to be submitted to a jury.

<sup>11</sup> 2 Exch. 658.

<sup>12</sup> L. R. 10 C. P. 307.

<sup>13</sup> See, also, *Manufacturers' & Traders' Bank v. Hazard*, 30 N. Y. 229; *Blair v. Walt*, 69 N. Y. 116; *McKenzie v. British Linen Co.*, 6 App. Cas. 101; *Miles v. McIlwraith*, 8 App. Cas. 133; *Cornish v. Abington*, 4 Hurl. & N. 556.

<sup>8</sup> *Perkins v. Hart*, 11 Wheat. 256; *Wiggins v. Burkham*, 10 Wall. 132.

<sup>9</sup> 96 U. S. 720.

<sup>10</sup> 50 N. Y. 583.

## TENDER.

- I. Generally.
- II. Effect.
- III. Costs and Interest.
- IV. Refusal and Acceptance.
- V. Must Keep Tender Good.
- VI. Of Rent.
- VII. Estoppel.
- VIII. Tender of Specific Property.
- IX. Tender of Specific Performance.
- X. Tender of Mortgage Debt.

I. *Generally*.—A tender is an offer to deliver something in pursuance of some contract, or obligation, under such circumstances as to require no further act from the party making it, to complete the transfer;<sup>1</sup> thus, when a tender is pleaded in discharge of a contract, it must be so complete and perfect as to vest the absolute property in the person to whom it is made.<sup>2</sup> The plea of tender is one of the sub-divisions of the old plea to the action; thus after tender and refusal, if the creditor continues to harass his debtor with an action, it then becomes necessary for the debtor to plead, acknowledging the debt, but pleading the tender as a bar, and adding, says Blackstone, "that he has always been ready, *touts temps prist*, and is still read, *uncore prist*, to discharge it."<sup>3</sup> By the common law the plea of tender was only available to those who were guilty of no breach of contract, and hence was not good after day named for payment;<sup>4</sup> but in this country this strictness is greatly relaxed, and the right of tender is recognized at any time after the debt is due.<sup>5</sup> A tender must be made with profert, or with whatever is made its equivalent by the practice or rules of the court; the money itself should, in the usual practice, be brought into court, that it may be tendered there again, as it appears by the defendant's plea.<sup>6</sup>

II. *Effect*.—A tender at the time and place fixed by the contract, vests the property in the creditor and puts an end to his right to

sue;<sup>7</sup> is in fact an admission on the part of the debtor that he owes the amount tendered,<sup>8</sup> and is regarded as a payment of the same at the time.<sup>9</sup> The acceptance of a tender when made as full payment, has the effect of full satisfaction, and especially so if the claim be disputed,<sup>10</sup> but the acceptance of the tender without the condition, will not take from the creditor the right to proceed against the debtor for more.<sup>11</sup> An appeal is not waived by the acceptance of a tender.<sup>12</sup> When the tender has not been brought into court, the creditor can collect only the amount proved.<sup>13</sup> "It has been said in England, that by a tender is meant not merely that the debtor was once ready and willing to pay, but that he has always been so, and still is; and that the effect of it will therefore be destroyed if the creditor can show a demand by him of the proper fulfillment of the contract, at the proper time, and a refusal by the debtor."<sup>14</sup> The plea of a tender admits the validity of the debt, or duty, insisting only on the fact, that there has been an offer to pay or perform it.<sup>15</sup> A tender, in fact, admits plaintiff's cause of action to the amount of the tender, and plaintiff is entitled to judgment in that amount.<sup>16</sup> In general, a tender can only be made with effect in cases where the demand is a liquidated sum, or a sum capable of liquidation by computation.

III. *Costs and Interest*.—"A debtor has the right at common law, before suit, to ten-

<sup>7</sup> *Cromwell v. Wilkinson*, 18 Ind. 365; *Mitchell v. Merrill*, 2 Blackf. 87; *Pothier on Ob's*, N. 545; *Lamb v. Lathrop*, 13 Wend. 95; *Case v. Greene*, 5 Watts. 262; *Garrard v. Zachariah*, 1 Stewart, 272; *Gaines v. Manning*, 2 Greene, 254; *Zinn v. Rawley*, 4 Barr. 169; *Curtiss v. Greenbanks*, 24 Vt. 537; *Slingerland v. Moore*, 8 Johns. 474; *Cornell v. Greene*, 10 S. & R. 14; *Carley v. Vance*, 17 Mass. 389; *Law v. Jackson*, 9 Cow. 641; *Contra*, see *Weld v. Hadley*, 1 N. H. 295.

<sup>8</sup> *Barnes v. Bates*, 28 Ind. 15; *Irvin v. Gregory*, 13 Gray, 215; *Monroe v. Chaldeck*, 78 Ill. 428; *Currier v. Jordan*, 117 Mass. 209; *Preble v. Murray*, 4 Hayw. 27.

<sup>9</sup> *Reed v. Armstrong*, 18 Ind. 446; *Contra*, see *Mohn v. Stoner*, 11 Iowa, 3.

<sup>10</sup> *Miller v. Halden*, 18 Vt. 337; *Tousley v. Healey*, 39 Vt. 522; *Cole v. Champlain Transportation Co.*, 26 Vt. 87; *Adams v. Helm*, 55 Mo. 468; *Jenks v. Burr*, 56 Ill. 450.

<sup>11</sup> *Higgins v. Holligan*, 46 Ill. 173.

<sup>12</sup> *Benkard v. Babcock*, 2 Robt. 175.

<sup>13</sup> *Able v. Opel*, 24 Ind. 250.

<sup>14</sup> 2 *Parson on Contracts*, 645; *Dixon v. Clark*, 5 C. B. 365; *Calton v. Goodwin*, 7 M. & W. 147.

<sup>15</sup> 2 *Greenl. on Evidence*, 525.

<sup>16</sup> *Johnson v. Triggs*, 4 Gr. (Ia.) 97; *Phelps v. Kathron*, 30 Ia. 231; *Gray v. Graham*, 34 Ia. 425.

<sup>1</sup> *Bouvier's Law Dictionary*. See *Tender*.

<sup>2</sup> *Schrader v. Walfing*, 21 Ind. 238.

<sup>3</sup> 2 *Cooley's Blackstone*, p. 302, book iii.

<sup>4</sup> *Ashburn v. Poulter*, 35 Conn. 533; *Steedwell v. Cook*, 28 Conn. 545; *Hume v. People*, 8 East., 186; *Rose v. Brown*, Kirby, 293; *Frazier v. Cushman*, 12 Mass. 277; *Poole v. Turnbridge*, 2 M. & W. 223; *Dobie v. Larkin*, 10 Exch. 776; *Dewey v. Humphrey*, 5 Pick. 187.

<sup>5</sup> 2 *Parson's on Contracts*, 642.

<sup>6</sup> *Clark v. Mullenix*, 11 Ind. 532; *Mason v. Croom*, 24 Ga. 211; *Brock v. Jones*, 16 Texas, 461.

der the amount due to his creditor upon a certain and liquidated demand; and thereby save himself from the payment of subsequent interest and costs."<sup>17</sup> A tender, if kept good, stops the running of interest and saves costs;<sup>18</sup> thus, where a tender has been made and refused before suit, and afterwards kept good, the plaintiff must pay the costs, if he does not recover more than the sum tendered;<sup>19</sup> nor in such case is the debtor chargeable with interest after the tender, unless he uses the money; and it is incumbent upon the creditor to prove such use.<sup>20</sup> A tender may be sufficient to stop the running of interest, although not a technical tender so as to give costs.<sup>21</sup>

**IV. Refusal and Acceptance.** The refusal of a tender must be certain and absolute; a conditional refusal "till I see my attorney" is not a refusal in law.<sup>22</sup> Where the plaintiff withdraws from the court, currency notes, which have been deposited by the defendant as a tender, such withdrawal is an acceptance of the tender and is full satisfaction of the debt sued on.<sup>23</sup> The immediate departure of the creditor upon an offer to tender being made, or any intentional evasion of the debtor, is equivalent to a refusal of the offer and will be sufficient to excuse the production of the money.<sup>24</sup> If a tender or offer to tender is once refused, it cannot afterwards be objected to on the ground that the money was not counted out;<sup>25</sup> but before any advantage can be gained by way of waiver, the party to whom a tender is made must have opportunity of objecting to the same.<sup>26</sup>

**V. Must Keep Tender Good**—For a tender to be of full force, and operative, it must be kept good, and this is accomplished, after suit, by the payment of the money into court for the sole and exclusive use of the party to whom the tender was made.<sup>27</sup> There is a great difference in the manner of keeping a tender good, as regards before and after suit. Before suit it is not necessary to pay into court, but after suit it is necessary that the tender be pleaded and remain in court.<sup>28</sup> In equitable proceedings this rule will not be enforced.<sup>29</sup> In cases strictly at law a reasonable time, in view of the circumstances, will be allowed to bring the money into court and keep the tender good.<sup>30</sup> An Iowa statute about correctly expresses the spirit of the general law upon the subject. It is as follows: "When a tender of money or property is not accepted by the party to whom it is made, the party making it may, if he sees fit, retain in his own possession the money or property tendered; but if afterwards the party to whom the tender was made, see proper to accept it and give notice thereof to the other party, and the subject of the tender be not delivered to him within a reasonable time, the tender shall be of no effect."<sup>31</sup> A tender must be kept good: that is, the debtor must at all times, be prepared, to meet a demand for the money he has tendered, and if he fails to do so he places himself in default and loses the benefit of his tender.<sup>32</sup> The identical money is not necessary. The debtor is at liberty to use it as his own, but at his peril if he fail to have it ready at any time.<sup>33</sup> It is not a sufficient "keeping good" to de-

<sup>17</sup> 1 Sutherland on Damages, p. 443.

<sup>18</sup> Johnson v. Triggs, 4 Gr. (Ia.) 97; Dixon v. Clark, 5 C. B. 366; Walstell v. Atkinson, 3 Bing. 290; Colt v. Houston, 3 Johns. 243; Carley v. Vance, 17 Mass. 398; Raymond v. Bearnard, 12 Johns. 274; Cornell v. Green, 10 S. & R. 14.

<sup>19</sup> Prather v. Pritchard, 26 Ind. 65.

<sup>20</sup> Hunter v. Bales, 24 Ind. 299.

<sup>21</sup> Goff v. Rehobath, 2 Cush. 475; Suffolk Bank v. Worcester Bank, 5 Pick. 106. See 2 Cooley's Blackstone, p. 304, book iii, for an excellent and extended note upon the effect of a tender.

<sup>22</sup> King v. Finch, 60 Ind. 420; Shotwell v. Denman, Cox, (N. J.) 174.

<sup>23</sup> Wells v. Robb, 2 Cent. L. J. 598; s. c. 9 Ky. Court of Appeals, p. 26.

<sup>24</sup> Holmes v. Holmes, 12 Barb. 137; Gilmore v. Holt, 4 Pick. 257; Rainey v. Jones, 4 Humph. 490; Sands v. Lyon, 18 Conn. 18; Judson v. Ensign, 6 Barb. 258; Southworth v. Smith, 7 Cush. 391.

<sup>25</sup> Wesling v. Noonan, 31 Miss. 59.

<sup>26</sup> Sloan v. Petrie, 16 Ill. 262.

<sup>27</sup> Lynch v. Jennings, 43 Ind. 287.

<sup>28</sup> Johnson v. Triggs, 4 Gr. (Ia.) 97; Freeman v. Flemming, 5 Ia. 460; Shugart v. Pattee, 37 Ia. 422; Jarbee v. McAtee, 7 B. Mon. 279; Nelson v. Oren, 41 Ill. 18; Alexandrie v. Saloy, 14 La. Ann. 327; Call v. Scott, 4 Cal. 402; Terrell v. Walker, 65 N. C. 91; Brock v. Jones, 16 Texas, 461; Mason v. Croom, 24 Ga. 211; Harvey v. Hockley, 6 Watts. 264.

<sup>29</sup> Hayward v. Munger, 14 Ia. 516.

<sup>30</sup> Walde v. Joy, 45 Ia. 282.

<sup>31</sup> Sec. 2104, McClain's Annotated Statutes (1880); Nantz v. Lober, 1 Duval, 304; Rose v. Brown, Kirby, 243.

<sup>32</sup> Bank v. Rushmore, 28 Ill. 463; Saver v. O'Reiley, 80 Ill. 104; Haynes v. Thorne, 28 N. H. 386; State v. Briggs, 65 N. C. 159; Warrington v. Pollard, 24 Ia. 281; Kortright v. Cady, 23 Barb. 490; Jarbee v. McAtee, 7 B. Mon. 279; Mason v. Croom, 24 Ga. 211; Bock v. Jones, 16 Texas, 461.

<sup>33</sup> Curtiss v. Greenbanks, 24 Vt. 563. But the *contra* as to the use of the money after tender; See Roosevelt v. Bull's Head Bank, 45 Barb. 479.

posit the money with a third person and give the creditor notice. The creditor is not obliged to call upon the third party mentioned, but if he call upon the debtor, and he be not able to pay, the benefits acquired by the tender are lost.<sup>34</sup> The debtor may make the tender by any one authorized, but the demand that will destroy the legal effect of the tender, must be made upon the debtor personally. Thus where a debtor's attorney having made a tender, the creditor's attorney, subsequently, agreed to take it, but it was held that this assent was not such a demand as would avoid the tender. The demand for such a purpose, must be made upon the debtor personally.<sup>35</sup> If money is tendered, with which the debtor then, had a right to discharge the debt, he cannot be made to bear the loss of subsequent depreciation.<sup>36</sup> If the creditor sees fit to demand the tender it must be for the precise sum tendered;<sup>37</sup> and where the tender has been made by two persons, demand on one is sufficient.<sup>38</sup> A tender may lose its effect by mutual waiver, as where after tender, the debtor, at the suggestion of the creditor, consents to retain the money.<sup>39</sup>

In case of a sheriff's sale of land, having been rendered inoperative by failure of purchaser to pay bid, and by failure of sheriff to make a proper memorandum, grantee of judgment debtor, tendered amount due on judgment, and filed complaint for injunction, offering therein to pay whatever sum should be found due on the judgment, and the court held that it was not necessary that tender should be followed by payment of money into court.<sup>40</sup>

VI. *Of Rent*—With regard to place of tender of rent, there is no doubt that at common law the lessor must demand the rent upon the land on the day when it becomes due, at a convenient time before sunset, but not earlier, in order to re-enter for breach of condition upon non-payment;<sup>41</sup> but a covenant for payment like other contracts of that kind, is not performed, unless the tenant seeks the

landlord.<sup>42</sup> If the contract is silent as to a place of payment, a tender by tenant off the land is good.<sup>43</sup>

VII. *Estoppel*—Where a person from design absents himself from home for the purpose of fraudulently avoiding a tender, he is estopped from saying that no tender had been made;<sup>44</sup> and also where a tender of a deed has been made, and he, to whom the tender was made, refuses it, without stating wherein it is defective, or what deed he will take, cannot afterwards object to the tender.<sup>45</sup> The evidence of the waiver of a tender by the opposite party is competent and sufficient to support the averment of a tender.<sup>46</sup>

VIII. *Tender of Specific Property*—If a debtor be present in person, or by agent, and makes a tender of specific articles at the proper place and time, and the creditor does not come to receive them, the debt is thereby discharged;<sup>47</sup> to accomplish this the debtor must have the property at the place agreed upon at the last convenient hour of that day.<sup>48</sup> The debtor may abandon the articles tendered, yet if he does not, and retains possession, he does so in the capacity of a bailee, and at his own expense and risk.<sup>49</sup> If a note is payable in goods at a particular place, on demand, the maker must have the goods always ready at the place,<sup>50</sup> and all articles of merchandise must be properly designated and set apart.<sup>51</sup> If the place of payment of specific articles be at the election of the payee, it is a privilege, which, if not exercised in a reasonable time, is waived, and the debtor may elect the place and there tender the articles and give notice to payee;<sup>52</sup> when the goods are cumbersome

<sup>34</sup> Haldane v. Johnson, 8 Exch. 689.

<sup>35</sup> Walter v. Dewey, 16 Johns. 222; Soward v. Palmer, 8 Taunt. 277; Hunter v. Le Conte, 6 Cow. 728.

<sup>36</sup> Southworth v. Smith, 7 Cush. 393; Gilmore v. Holt, 4 Pick. 258.

<sup>37</sup> Gilbert v. Mosier, 11 Ia. 498.

<sup>38</sup> Holmes v. Holmes, 9 N. Y. 525.

<sup>39</sup> Dorman v. Elder, 3 Blackf. 490; Johnson v. Baird, 3 Black. 182; Lamb v. Lathrop, 13 Wend. 95; Robinson v. Batchelder, 4 N. H. 46; Smith v. Loomis, 7 Conn. 110; Garvard v. Zachariah, 1 Stewart (Ala.) 272; Peyton's Case, 9 Co. 79 (a).

<sup>40</sup> Aldrich v. Albee, 1 Greenl. 120; Tierman v. Napier, 5 Yerg. 410.

<sup>41</sup> 2 Kent's Com. 509.

<sup>42</sup> Bailey v. Simmons, 6 N. H. 159; Mason v. Briggs, 16 Mass. 453.

<sup>43</sup> Smith v. Loomis, 7 Conn. 110.

<sup>44</sup> Goodwin v. Holbrook, 4 Wend. 377; Chipman on Contracts, 51—56; Peck v. Hubbard, 11 Vt. 612.

<sup>34</sup> Trow v. Trow, 24 Pick. 168.

<sup>35</sup> Berthold v. Reyburn, 37 Mo. 586.

<sup>36</sup> Jeeter v. Littlejohn, 3 Murp. L. & Ed. 186; Anonymous, 1 Hayw. 183.

<sup>37</sup> Rivers v. Griffiths, 1 Dow. & Ry. 215.

<sup>38</sup> Pierce v. Bowles, 1 Stark. 523.

<sup>39</sup> Terrell v. Walker, 65 N. C. 91.

<sup>40</sup> Ruckle v. Barbour, 48 Ind. 274.

<sup>41</sup> Aeocks v. Phillips, 5 H. & N. 183.

the presumption is that the creditor was to appoint a place;<sup>53</sup> but it is said that the situation and circumstances of the parties will establish the place of tender.<sup>54</sup> When the contract is to deliver unidentified property of a specific kind, it is sufficient to allege a tender of a sufficient amount of the quantity and kind named.<sup>55</sup> In an action founded upon alleged fraud in making a sale of a patent-right, alleged to have no value, it is not necessary to make a tender of the patent-right back to the defendant before suit,<sup>56</sup> but in the case where there are two men of the same name, and A. exchanges with B. a note with that name signed to it, for property, knowing that B. acts upon the belief that the signature is that of the one who is wealthy, and A. knows this, and that in fact it bears the signature of the other man of that name, then A.'s silence is fraud, and B. may rescind the contract by tendering the note and demanding the property.<sup>57</sup>

**IX. Tender of Specific Performance.**—In cases of specific performance where the covenants are mutual and dependent, and the performance must be simultaneous, it is not necessary to make a strict tender,<sup>58</sup> for it is sufficient to be willing and ready to perform, and such willingness will constitute a good tender for specific performance.<sup>59</sup> Where the tender made is conditional, it is not an admission that the money paid into court be-

longs unconditionally to the adverse party,<sup>60</sup> nor can one receive money conditionally paid into court, while he denies the existence of the contract upon which it is paid.<sup>61</sup> In a suit for specific performance, it is sufficient for the plaintiff to offer by his bill to bring in his money, whenever the same sum is liquidated, and he has a decree for performance.<sup>62</sup> A. B. & C., were each appointed by a corporation, as individual agents, to tender a certain amount to D., and obtain from him a re-conveyance of certain real estate conveyed to D. as a security; the tender was made by A., and was held to be good.<sup>63</sup>

**X. Tender of Mortgage Debt.**—A tender of a debt secured by a mortgage, after the day stipulated for payment, removes the lien of the mortgage as a tender at the day;<sup>64</sup> but where the tender does not discharge the debt, but only defeats a particular remedy, which is the right to foreclose, it is not necessary to show continued readiness to pay or to bring the money into court.<sup>65</sup> It is well settled in many States, that a mortgage does not convey any title in land, whatever, but only creates a lien on the property, the title remaining in the mortgagor, subject only to the lien;<sup>66</sup> but *contra* in some other States.<sup>67</sup> The real cause of this difference of opinion, as to the effect of a tender after the law day, arises from the manner in which mortgages are regarded in the several States. Some of the States follow the common law rule, which is that such a tender would not affect the mortgagee's interest in the estate, as even a full payment after a breach of the condition would not revert the title; other States re-

<sup>53</sup> 5 Me. 192.

<sup>54</sup> 7 Barb. 472.

<sup>55</sup> Polk v. Frash, 61 Ind. 206; Newby v. Rogers, 54 Ind. 193.

<sup>56</sup> Hess v. Young, 59 Ind. 397.

<sup>57</sup> Parish v. Thurston, 87 Ind. 437.

<sup>58</sup> Irvin v. Gregory, 13 Gray, 215.

<sup>59</sup> Kane v. Hood, 13 Pick. 281. From Pomeroy on Contracts, § 326, the following note is made: "Although the plaintiff must, in general, show an actual performance on his own part, or else a tender or offer of performance, yet such tender, or offer, is sometimes unnecessary, and a readiness and willingness to perform, is sufficient. The necessity of a tender is obliterated, and the readiness and willingness supply its place, whenever the case shows, either in the allegations or the evidence, that if a tender had been made, it would have been refused by the defendant: Doo-good v. Rose, 9 C. B. 131; Hunter v. Daniel, 4 Hare, 420; Lovelock v. Franklin, 8 Q. B. 371; Wilmot v. Wilkinson, 6 B. & C. 506; Poole v. Hill, 6 M. & W. 835; Seaward v. Willock, 5 East. 202, or shows that the defendant had, by his own act or omissions, made it impossible for him to accept the plaintiff's offer and to fulfill his own part of the agreement. See Kerby v. Harrison, 2 Ohio St. 326; Hatham v. East India Co., 1 T. R. 638; Stewart v. Raymond, 7 S. & M. 568; Tyler v. McCordle, 9 S. & M. 230."

<sup>60</sup> Lynch v. Jennings, 43 Ind. 287.

<sup>61</sup> Hunter v. Bales, 24 Ind. 209; Sowle v. Holdridge, 25 Ind. 119.

<sup>62</sup> Irvin v. Gregory, 13 Gray, 219; Combs v. Carr, 55 Ind. 303; Seller v. Lingeran, 24 Ind. 264.

<sup>63</sup> St. Paul Div. v. Brown, 11 Minn. 556.

<sup>64</sup> Farmer's Fire Insurance and Loan Co. v. Edwards, 26 Wend. 441; Kortright v. Cady, 21 N. Y. 343; Johnson v. Sherman, 15 Cal. 287; Bailey v. Metcalf, 6 N. H. 156; Coggs v. Bernard, 2 Lord Raym. 916.

<sup>65</sup> Kortright v. Cady, 21 N. Y. 343; Moynahan v. Moore, 9 Mich. 149; Arnot v. Post, 6 Hill (N. Y.) 65.

<sup>66</sup> Kidd v. Teeple, 22 Cal. 255; Wood v. Trask, 7 Wis. 566; Wright v. Henderson, 12 Texas 43; Hyman v. Kelley, 1 Nev. 179; Morton v. Noble, 22 Ind. 160; Chick v. Willetts, 2 Kansas, 384; Wilkins v. French, 20 Me. 111.

<sup>67</sup> Knox v. Easton, 38 Ala. 345; Kannaday v. McCarron, 18 Ark. 166; Chamberlain v. Thompson, 10 Conn. 251; Pollock v. Maisson, 41 Ill. 516; Redman v. Sanders, 2 Dana, (Ky.) 68.

gard a mortgage as merely a pledge of the land, of which the mortgagor remains the owner, and a tender, after the breach, is regarded as having the same effect as a tender made of a pledge of personal property, in respect to which the rule is, that a tender and refusal at any time, of the full amount of the debt, extinguish the lien.<sup>68</sup>

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<sup>68</sup> *Coggs v. Bernard*, 2 Lord Raym. 909; *Kortright v. Cady*, 21 N. Y. 343; *Goodenow v. Ewer*, 16 Cal. 467; *Wood v. Trask*, 7 Wis. 566; *Wright v. Henderson*, 12 Texas, 43. See, for full citation of cases, 15 Cent. L. J. 408, note 2, as also for a full discussion of "Tender of mortgage debt after day of payment."

#### RESULTING TRUSTS.

HARRISON BIBB, ET AL., V. HARRY HUNTER.

*Supreme Court of Alabama, December Term, 188*

1. *Express Trust, How Created*.—An express trust in lands, resting on an agreement between the parties, can only be created or declared by an instrument in writing, signed by the party creating or declaring it, (Code, § 2199), though no particular form of words is necessary; and while a list of assessment for taxation, signed by the holder of the legal title, may be an admission on his part that he holds for the benefit of another, it can not operate as the creation or declaration of a trust in any part of the lands, within the meaning of the statute.

2. *Resulting Trust—What Necessary to Establish*.—To establish a resulting trust in lands, in favor of the person who advanced the purchase-money, while the title was taken in the name of another, it must be shown that the consideration moved from him in the first instance, and as a part of the original transaction; that he furnished the purchase-money, if money was paid, or the other thing of value which constituted the consideration, or that the credit was extended to him.

3. *Same—Burden of Proof—Oral Declarations*.—The presumption being, that the conveyance speaks the truth, the onus is on the party who seeks to establish a resulting trust in the land, to overcome this presumption by evidence full, clear, and satisfactory; and the verbal admissions or declarations of the grantee, while admissible as evidence against him, are not sufficient, unless plain and consistent with themselves, or corroborated by circumstances.

4. *Evidence—Transactions with Deceased*.—The conveyance being taken to the grantee for life, with remainder to certain grandchildren by name, the complainant, another grandchild, claiming a resulting trust on account of money advanced by him to make the purchase, may testify to transactions between himself and the deceased grantee. [Code, § 3058]; but, the bill not being filed until after the death of the grantee, that fact must be considered in weighing his testimony, and it renders more stringent the necessity for corroborating circumstances.

5. *Resulting Trust in Part of Lands—When such*

*Relief not Granted*.—If the complainant's notes were given for the deferred payments, though the cash payment was made by the grantee with his own funds, a resulting trust might be declared in a corresponding aliquot part of the lands, though the notes were paid at maturity by the grantee himself; but this relief can not be granted under a bill which claims a resulting trust in the entire tract of land.

Appeal from the Montgomery City Court.

*Watts and Son*, counsel for appellants; *Rice and Wiley*, and *Smith, McDonald and Marks*, *Contra*.

Tried before Hon. T. M. Arrington, judge city court, of Montgomery.

CLOFTON, J. delivered the opinion of the court.

Section 2199 of the code declared: "No trust concerning lands, except such, as results by implication, or construction of law, or which may be transferred or extinguished, by operation of law, can be created, unless by instrument in writing, signed by the party creating or declaring the same, or his agent or attorney, lawfully authorized thereto in writing." The trusts, not included in the statute, are implied trusts—resulting or constructive—such as spring out of the facts of the transaction, independent and exclusive of any agreement between the parties. Whenever the trust rests on an agreement, it must be created or declared by instrument in writing, signed by the party creating or declaring the same. *Patton v. Beecher*, 62 Ala. 379. No particular form or precise words are required. Any instrument in writing, signed by the party, at the time of its creation, or subsequently, manifesting the nature, subject matter, and objects of the trust, with reasonable certainty, may suffice. The record does not show that the alleged trust is manifested by any writing, signed by Harrison, such as the statute requires. While the lists of assessment for taxation, signed by him, may be regarded as admissions of the right of complainant to the portion of the lands contained therein, they do not purport to be the creation or declaration of a trust, either in the whole of the land claimed, or a portion thereof, and are insufficient to prevent the operation of the statute. We may, therefore, dismiss from further consideration the aspect of the case, in which the title of complainant to relief is sought to be founded on an express trust.

A resulting trust rests on presumed intention, and is founded on the equitable principle, that the beneficial ownership follows the consideration. The trust results to the party from whom the consideration moves, before, or at the time of the purchase, or of the making of the conveyance. It results, no fiduciary relation existing between the parties, from the original transaction, and at the time it takes place. Generally, in the absence of circumstances, showing a different intention or understanding, a trust arises, whenever the purchase money of land is paid by one person, and the title taken in the name of another, whether the purchase is made by the advance of the purchase money personally, or by the grantee as his

agent. Though a resulting trust arises, where an agent, on a parol undertaking, purchases land for the benefit, pays for it with the money of his principal, and takes a deed for it in his own name; if nevertheless, in such case, the agent pays his own money for the land, not having any funds of the principal in hand, and not as a loan, a trust is not created, notwithstanding the principal may subsequently reimburse the agent the amount expended. In *Smith v. Burnham*, 2 Sumn., 435, Judge Story says: "I take it to be clear, upon principle, that if one person contracts by parol with another, that he will purchase an estate for the latter, he purchases the estate, and takes the conveyance in his own name, and pays for it out of his own money, and not out of that of the other party, that will not create a trust by implication of law in favor of the other party. The law in such case treats it as a parol contract to purchase, and holds in trust for the benefit of another; and not as a trust arising from operation of law." *Lehman v. Lewis*, 62 Ala. 129; *Fowke v. Slaughter*, 3 A. K. Marshall, 56. The foundation of a resulting trust being the payment of the consideration price by the person claiming to be the beneficial owner, if the party who sets it up has made no payment, he cannot show by parol evidence, that the purchase was made on his account, or for his benefit. There must be in the transaction something more than the breach of a parol agreement. Actual payment of the consideration in money is not essential. Payment may be made in labor, property, securities, credit, or anything of value. "The mode, time, and form, in which the consideration was rendered, are immaterial, provided they were in pursuance of the contract of purchase." "It is sufficient, if that which in fact formed the consideration of the deed moved from the party for whom the trust is claimed to exist, or was furnished in her behalf, or upon her credit. The trust results from the purchase [and payment of the consideration by or for one party, and the conveyance of land to another." *Blodgett v. Hildreth*, 103 Mass. 484; *Preston & Stetson v. McMillan*, 58 Ala. 84. The other essential facts existing a trust will be decreed in favor of one, who incurs an absolute obligation to pay the consideration before or at the time of the conveyance, and as a part of the original contract of purchase. 2 Pom. Eq. Jur. § 1037.

The case made by the bill is, that complainant procured and authorized Harrison to purchase for him the lands in controversy; that, acting under such authority, Harrison, about November 10, 1878, became the purchaser of the lands for and in behalf of complainant under a contract, by which the purchase money, being twelve hundred dollars, was to be paid, one-third in cash, and the balance in equal payments at one and two years; that Harrison made the cash payment with money furnished him by complainant, and the complainant executed his two promissory notes for the deferred payment; that the vendor executed a bond,

conditioned to make titles, on payment of the notes, to such person or persons, as Harrison might direct, of the nature of which bond, complainant was ignorant until a few months before the filing of the bill; that complainant furnished Harrison money, which he paid to the vendor, and took up the notes; that Harrison paid no part of the purchase money, and procured from the vendor on November 8, 1881, after the notes were paid, a deed conveying to him a life estate in the lands, with remainder to the defendants, who paid no part of the purchase money. The bill alleges facts, from which it is claimed a trust results, with sufficient preciseness and distinctness; and the inquiry must be addressed to the sufficiency of the evidence to sustain its allegations.

The sufficiency of the evidence must be tested by the application of well-settled rules. The burden of removing the presumption, that the conveyance speaks the truth, rests on the complainant. Appreciating the danger of having deeds or other solemn writings displaced by parol evidence, easy of fabrication, and sometimes incapable of contradiction, the courts have generally upheld the rule, that the presumption arising from the conveyance must prevail, unless overcome by evidence full, clear and satisfactory. While the verbal declarations or admissions of the grantee are admissible against him, they should be closely scrutinized, and unless they are plain and consistent, or corroborated by circumstances, are regarded as an insufficient basis for a decree establishing a trust. *Larkins v. Rhodes*, 6 Por. 195; *Lehman v. Lewis*, *supra*.

The only witness who testifies that complainant's money was used in paying for the lands, is complainant himself. Objections were made to his competency to testify to transactions with, or statements by Harrison, who is deceased. The statute—§ 3058 of the Code—applies to all cases, and to those only where a conflict of interest is involved between the party offered as a witness and the estate of a decedent, or between the witness and an adversary party to whom the decedent acted in a representative or fiduciary relation, and where the effect of the evidence tends to diminish the rights of the estate of the decedent, or of those claiming in succession under him, or of the other adversary party. *Insurance Co. v. Sledge*, 62 Ala. 566; *Dismukes v. Tolston*, 67 Ala. 386. Harrison had only a life interest in the property; his estate is not interested in the result of the suit, can neither gain nor lose thereby; the defendants do not claim in succession to him; and he was not acting, at the time of the statement or transaction, in any representative or fiduciary relation to them. The evidence does not fall within the exclusion of the statute. Whilst, therefore, in the consideration of the evidence, we shall consider the testimony of complainant, it must be weighed in view of the fact that the claim was not set up until after the death of the nominal purchaser, and the resulting impossibility of contradicting it—the

lips of the only person who could contradict it being sealed, beyond the power of the court to open—and of the consequent more stringent necessity of corroboration by circumstances.

The first question of fact is, with whose money was the cash payment made? Complainant states that he delivered to Harrison, about 1878, four hundred dollars, with which to make the payment; that he received the money from the sale of some land in South Alabama, and that Vaughan, his brother-in-law, was present when he delivered the money to Harrison. The testimony of Moses and Vaughan shows, that the land in South Alabama, from the proceeds of which the four hundred dollars delivered in the presence of Vaughan were derived, was not sold until March, 1881, several years after the purchase of the lands in controversy was made, and some months after all the purchase money had been paid. Holtzclaw, the vendor, testifies that the cash payment was made by crediting the amount on an acceptance of his held and owned by Harrison. It is evident that these witnesses are mistaken, or the complainant is mistaken as to the time he delivered the money to Harrison. It may be, that the four hundred dollars delivered to Harrison in March, 1881, was intended to refund the first payment which had been made by him. The record does not disclose or indicate any other purpose or reason. But there is no pretense, and the bill negatives the inference, that the payment was made by Harrison as a loan. No subsequent conduct, dealing, agreement or payment, disconnected from the original transaction was sufficient to raise a resulting trust.

The declaration of Harrison, that he was buying the land for complainant, qualified by his further declaration, that he was making the purchase in complainant's name on account of some judgments against himself, and that he expected to give it to complainant, and his declaration to Clisby, made under the circumstances and for the purpose of raising money to pay the notes of complainant, are too unsatisfactory and inconsistent to be made the basis of a decree; especially when the facts, on which a resulting trust can be founded, are disproved by the other evidence. Neither a verbal declaration of the nominal purchaser, that he is buying for another, without proof, that the purchase money was paid by such other, nor an inchoate, incomplete, and unexecuted intention to give, will raise a resulting trust.

It may be conceded, there are declarations and admissions of Harrison, inconsistent with the theory, that the lands were purchased on his own account, and for his own benefit, and which tend to show that he was purchasing them for complainant by agreement as his agent. On the other hand, we have the written admission of complainant, that he had no claim to certain land, which was included in the purchase, and Harrison's statement to complainant, that he would turn the land over to him as soon as he got the balance of purchase money out of it. The circumstances,

declarations, and admissions may tend to prove that the lands were purchased by an agreement of some kind; but the true character of the transaction remains in uncertainty and confusion. It is not sufficient that the evidence generates doubt and uncertainty. The declaration of a trust, as claimed by the bill, involves a disregard of most salutary principles, and abrogates rules, indispensable to the certainty and conservation of solemn and deliberate writings. The evidence is insufficient to authorize a decree of a trust in favor of a complainant to the extent of the entire lands.

The remaining inquiry is, can a trust be decreed in favor of complainant in a part of the lands? It is clear beyond question, that complainant executed his notes for the deferred payments, and thereby incurred, at the time of the purchase, and as a part of the original transaction, an absolute obligation to pay, in other words, that so much of the consideration moved from him. The money was sent from Mobile, and the services, for which Harrison was indebted, were rendered prior to the purchase of the lands. They constituted a debt due by Harrison, and were not furnished for the purpose of paying the notes, though there may have been a subsequent parol agreement, that the indebtedness should be so discharged. The notes as the vendor testifies, were paid by Harrison, partly in money, and partly in orders drawn by the *cestuis que trust*, for whose benefit he sold the land. If a trust *pro tanto* was created in favor of complainant, at the time of the purchase, by incurring the absolute obligation to pay, the subsequent payment of the notes by Harrison, who had incurred no obligation to pay them, cannot operate to remove or defeat such trust. Such payment only constituted him a creditor, with the right to reimbursement.

It has been said generally: "There can be no resulting trust of an estate to a particular extent of its value, leaving the residue of its value in the grantee;" that the beneficial ownership in the entire estate must exist—an unmixed trust of the ownership and title, and not a charge for the repayment of an advance or other demand, nor an equity to a sum of money to be raised out of the lands. It was also said by Chancellor Kent, that a trust results *pro tanto*, where part of the purchase money is paid by a third person, contemporaneously with the purchase; which statement of the rule has been in words adopted in many cases. A comparison of the authorities shows that these general statements may be harmonized, by being understood, as subject to the qualification, that when a partial payment, being a definite aliquot part of the consideration is made, a trust in a corresponding aliquot part of the land will result. But unless the payment be of an aliquot part of the consideration, if the amount be indefinite or uncertain, no trust results by implication of law—"a general contribution of a sum of money towards the entire purchase is not sufficient." 1 Smith's Lead. Cases (4th Am. ed.), 339; Botsford v. Burn, 2 Johns. Ch. 405; White v. Carpenter, 2

Paige, 217; McGowan v. McGowan, 14 Gray, 119. This rule must be understood as referring to simple resulting trusts as distinguished from investment of trust funds by trustees, or other persons acting in a representative or fiduciary capacity. If, therefore, the notes of complainant were for an aliquot part of the whole consideration, a trust results *pro tanto*, and will be decreed, on a proper case, complainant having reimbursed, or on his reimbursing Harrison the amount expended by him in paying the notes. It is unnecessary, however, to consider whether the evidence brings the case within the operation of this rule, as such relief cannot be granted on the bill as it now stands. Reversed and remanded.

NOTE.—In many States are statutes similar to the one referred to in this case;—that no trust concerning lands, unless those arising by implication of law, can be created unless in writing signed by the party creating the same, or by his attorney lawfully authorized; frequently the authorization must be in writing.<sup>1</sup>

Of course such a statute does not affect personal property; and a trust therein may be created by parol.<sup>2</sup>

In this case a tax assessment was insufficient to create a trust. So where one was in an embarrassed position, and his real estate was about to be sold on execution, and his friend, on application agreed to buy in the property and hold it in trust for him until he could reimburse him, it was held to create no trust.<sup>3</sup>

So an agreement to hold real estate, voluntarily conveyed, in trust for the grantor cannot be shown by parol.<sup>4</sup>

What is not sufficient to constitute a trust, is illustrated by the following case: A. purchased certain real estate from B., for which he paid in money and in other land in the conveyance of which to B., the wife of A. joined with her husband. At his request, without the wife's knowledge, who supposed that the entire property so bought from B., was conveyed to her husband, a portion of which was conveyed by B., by deed absolute on its face, to C., a son of A. by a former marriage, and the deed was delivered by B. to A. Nothing of the transaction was known by C. till he received a letter by mail written to him by A. on the day of the conveyance, informing him of the transaction, and that A. would want a deed from C. in a few days, to the children of E. and F., daughter of A. by the former marriage; that A. would send a deed for C. to sign in a few days; that the property was then in C's name, and that A. desired C. to tell the wife of the latter how it was situated then, so that she would know all about it if C. should die; and if A. should, he desired the property so conveyed to C., to be made over to said children, the rents and profits to be paid them yearly for their support, and when they became of age to have the property in fee simple, to be disposed of as they please;<sup>5</sup> that A. thought he had bought the B. property very low; that it cost B. a certain sum, "and as property is advancing, it must bring that again, but

I shall not sell it as it is a good location, and will let the children have it;" and requesting C. to not let any one know that he (C.) had paid for half the B. property. C. at once answered, A. by letter, acknowledging the receipt of the letter from A., and saying that he (C.) had told his wife about the arrangement A. proposed making in case C. should die, and that she would follow the injunction of A's letter in that event, C. and his wife had no children, subsequently, without any consideration, at A's request, C. and his wife conveyed the real estate to A. for life; then in separate parcels, to E. and F. for life, remainders in fee simple to the children of E. and F. after the execution of the deed from B., A made expensive improvements on the land so conveyed to C., collected rent and paid taxes, and assessments of all kinds. A. died intestate, leaving his wife and issue by her, surviving him. It was held that no real trust resulted in favor of A. for the conveyance of B. to C., and that the letter did not create a trust in favor of A. or confer on him the right to the use, control, or disposition of the property conveyed to C., but that the letter did create a trust in favor of the children of E. and F. which a court of equity would have enforced.<sup>6</sup>

If one takes the property as the agent of another, equity implies a trust in favor of the latter.<sup>6</sup>

An estate in lands purchased in the name of one with money belonging to and paid by another is subject to a resulting trust in favor of the person to whom the money belonged. This a familiar doctrine of equity. Thus, three brothers in Europe agreed to labor on their joint account, for the purpose of creating a common fund to be invested in the lands for the benefit of all; this agreement was executed and the lands purchased in the name of one of them. This was held to create a trust estate.<sup>7</sup>

In the case just cited there was an express agreement to hold in trust; and under the Indiana statute, when the transaction is not tainted with fraud, an express agreement must be shown, else there is no trust.<sup>8</sup>

If two or more persons put their funds together to purchase real estate with an agreement that one shall hold a trustee for both or all, it is a valid trust and can be enforced.<sup>9</sup>

Cases of a husband taking the title of lands purchased with the wife's money in himself are of frequent occurrence.<sup>10</sup>

In such case, and similar ones, it is considered that the transaction is tainted with fraud.<sup>11</sup>

Accepting a conveyance of real estate under a parol

<sup>5</sup> Gaylord v. Dodge, 31 Ind. 41. See Allen v. Withrow, 110 U. S. 119; Kingsbury v. Burnside, 58 Ill. 310; s. c., 11 Amer. Rep. 67.

<sup>6</sup> Manning v. Hayden, 5 Sawyer, 360. See Summers v. Roos, 42 Miss. 749; s. c., 2 Am. Rep. 653.

<sup>7</sup> McDonald v. McDonald, 28 Ind. 68.

<sup>8</sup> Glidewell v. Spauigh, 26 Ind. 319.

<sup>9</sup> Robbins v. Robbins, 89 N. Y. 251; reversing same case, 15 J. & S. 193; Nelson v. Worrall, 20 Iowa, 469; Haigh v. Kaye, L. R. 7 Ch. App. Cas. 469.

<sup>10</sup> Malady v. McEnery, 30 Ind. 273; Summers v. Hoover, 42 Ind. 153; Davis v. Davis, 43 Ind. 561; Tracy v. Kelley, 52 Ind. 535; Miller v. Edwards, 7 Bush. 394; Thomas v. Standiford, 49 Md. 181.

<sup>11</sup> Hubble v. Osborn, 31 Ind. 249; Rhodes v. Green, 36 Ind. 7; Milliken v. Horn, 36 Ind. 186; Flynt v. Hubbard, 57 Miss. 471; Brannon v. May, 43 Ind. 92; McCollister v. Willey, 52 Ind. 382; Hampson v. Fall, 64 Ind. 322; Milner v. Hyland, 77 Ind. 458; Radcliff v. Radford, 96 Ind. 482; Derry v. Derry, 98 Ind. 319; Marvin v. Brooks, 94 N. Y. 71; Warwick v. Warwick, 31 Gratt. 70; Johnson v. Anderson, 7 Baxt. 351.

1. R. S. Ind., 1881, § 2909.

<sup>2</sup> Hon v. Hon, 70 Ind. 135; Gilman v. McArdie, 99 N. Y. 451; Allen v. Withrow, 110 U. S. 119; Ray v. Simmons, 11 R. I. 286; s. c., 23 Am. Rep. 447.

<sup>3</sup> Minot v. Mitchell, 30 Ind. 228; Rucker v. Steelman, 73 Ind. 306; Merritt v. Brown, 6 C. E. Gr. (N. J.) 401; Payne v. Patterson, 77 Pa. St. 134; Loomis v. Loomis, 60 Barb. 22. See Jones v. Jones, 97 Ind. 188; Pearson v. East, 36 Ind. 27; Foy v. Reddick, 31 Ind. 414.

<sup>4</sup> Fouty v. Fouty, 34 Ind. 433.

contract to convert it in money and pay off the grantor's debt, is a binding contract, and the trust can be enforced.<sup>12</sup>

But an implied trust can not be created by putting money in the hands of another to be invested in land for the use and benefit of a third person. This can be done only by an express trust in writing.<sup>13</sup>

Thus, where a wife placed her separate personal property in the hands of her husband, in trust, to invest in real estate for her daughter, who invested it in the real estate in his own name; and before his death devised it to his daughter, and the will was probated; this was held not to create a trust so as to avoid creditors whose judgments had become a lien during his life-time.<sup>14</sup>

Where a husband, during a long series of years, received and applied the rents of his wife's real to the common use of the family, without objection from her and under circumstances showing no intention on the part of either that he should be charged therewith, it was held that she, after his death, could not have a trust declared in lands in which part of the rents have been invested, and claim him as her trustee.<sup>15</sup>

If the conveyance is to the wife and the husband has paid the purchase money, there is no resulting trust; because he is, under a moral and legal obligation to provide for her. The transaction is regarded, *prima facie*, as an advancement for her benefit. Her contract to hold them as a trustee for him is void.<sup>16</sup>

It appeared by the pleading that the defendant, under parol agreement with the plaintiff, purchased the land in controversy; that if the latter agreed to stay with the former and work for him for a certain period, the "labor performed by the plaintiff should entitle him to one-half in value of the land;" that the plaintiff had performed the labor; that the defendant "with the means acquired by their joint labor" had purchased the land, taking the title in himself; and "that, after the purchase, the plaintiff had farmed a portion of said land," and has had, and held open and notorious possession of the same from that time to the time of commencing the action." Held, that there was no trust; nor any cause of action shown.<sup>17</sup>

So where a guardian purchased lands for himself, upon his own credit, and took a conveyance to himself, and afterwards, in violation of his duty, used the money of his wards in payment of the purchase money, no trust in the lands, it was held, resulted or arose in favor of the wards.<sup>18</sup>

The court quoted from a case in Alabama<sup>19</sup> this language: "To create the equity either to charge the lands, or to raise a resulting trust, a payment of the trust funds at the time of the purchase is indispensable. A subsequent payment by the trustee of the debt he may have contracted in the purchase of the lands, will not by relation attach any trust or lien to the original purchase."

Quoting from another case, also, the following: "The trust results from the original transaction at the time

it takes place, and at no other time; and it is founded on the actual payment of money, and on no other ground. It cannot be mingled or confounded with any subsequent dealings whatever."<sup>20</sup>

Parol evidence to establish a trust in land held by an absolute conveyance, must be strong and clearly relevant, especially after a long lapse of time, and the death of the nominal purchaser.<sup>21</sup>

The declarations of the trustee against his interest must be clear and explicit in order to charge him as such.<sup>22</sup> A trust arising by declaration of law cannot be changed subsequently by oral declaration.<sup>23</sup>

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<sup>20</sup> Niver v. Crane, 98 N. Y. 40; Lehman v. Lewis, 62 Ala. 129; Coles v. Allen, 64 Ala. 98; Blodgett v. Hildreth, 103 Mass. 484; Rogers v. Murray, 3 Paige, 390.

<sup>21</sup> Parker v. Snyder, N. J. Eq. 164; Collier v. Collier, 30 Ind. 32; Blair v. Bost, 4 Blackf. 539; Patton v. Beecher, 62 Ala. 579; Whitmore v. Learned, 70 Me. 276; Merwitz v. Forling, 2 N. E. Rep. 525.

<sup>22</sup> Crouse v. Frothingham, 97 N. Y. 105.

<sup>23</sup> Watson v. Thompson, 12 R. I. 456. See Agr. Mech., etc. Assoc. v. Brewster, 51 Tex. 257; Allen v. Withrow, 110 U. S. 119.

## APPLICATION BY PETITION TO DECLARE ELECTION FOR PROHIBITION VOID.

MILLER V. JONES: JONES V. MILLER.

Supreme Court Alabama.

1. *Courts—Power of, to Vacate Void Orders.*—Every court possesses the inherent power to vacate, on motion of any party having an interest, an order made by it which is void on the face.

2. *Local Option Election — Petition to Probate Court—Certiorari From, Circuit Court.*—When an election has been ordered and held under a "Local Option Law," a petition to set aside the order and proceedings, on the ground that they are void, is properly addressed to the probate judge of the County; and on his refusal to set aside, the proceedings may be removed by *certiorari* into the circuit court.

3. *Certiorari—Objections to.*—It is no objection to the *certiorari*, in such case, that two or more orders are united in one writ; since an inspection of the record of the entire proceedings is necessary to enable the court to decide as to their validity.

4. *Certiorari—Who entitled to Writ.*—A person who is engaged in the business of retailing spirituous liquors, under a license regularly issued to him, has such an interest in the proceedings as authorizes him to sue out a *certiorari* to test their validity; and if the license is in the name of a partnership, the writ may be sued out by one of the partners individually.

5. *Power of Courts—Judicial, not Legislative.*—The power conferred on the probate judge, by the statute authorizing such proceedings, is judicial, not legislative; and in deciding on the validity of the proceedings, or of the statute under which they are held, the courts are not infringing on the powers of the legislative department of the government.

6. *Petition for Election—Requisites of.*—Under the special law applicable to Talladega county, under which

<sup>12</sup> Teague v. Fowler, 56 Ind. 569; McCollister v. Willey, 82 Ind. 382; Clark v. Honey, 62 Tex. 511; s. c., 50 Am. Rep. 576.

<sup>13</sup> Rooker v. Rooker, 75 Ind. 571; Irwin v. Ivers, 7 Ind. 308; Botsford v. Burr, 2 Johns. Ch. 405; Bartlett v. Pickersgill, 4 East, 477; Hughes v. Moore, 7 Cranch. 176; Hon v. Hon, 70 Ind. 135.

<sup>14</sup> Rooker v. Rooker, *supra*.

<sup>15</sup> Bristol v. Bristol, 101 Ind. 47; s. c., 83 Ind. 276; s. c., 93 Ind. 281; Derry v. Derry, 98 Ind. 519.

<sup>16</sup> Lochenour v. Lochenour, 61 Ind. 595.

<sup>17</sup> Neal v. Neal, 69 Ind. 419.

<sup>18</sup> French v. Shepler, 83 Ind. 266.

<sup>19</sup> Tilford v. Torrey, 53 Ala. 120.

the election in this case was ordered and held, the probate judge has no jurisdiction to order an election, except on the filing of a petition in writing, praying for it, and signed by "fifty or more resident house-holders and freeholders" of the county (Sess. Acts 1884-5, p. 234); and the signers must possess both of these qualifications.

7. *Petitions—When Supplemental to Each other*—If two or more petitions, each signed by less than fifty persons, can be considered as supplemental of each other, each must contain averments of all the necessary jurisdictional facts.

8. *When Act Unconstitutional*—The title of said local law is "an act to regulate the sale," &c., of spirituous liquors in said county, while the law itself undertakes to authorize prohibition of all sales, if the election so results; and this renders the law violative of the constitutional provision (Art. IV, § 2,) that the subject of every law "shall be clearly expressed in its title."

9. *Appeal—Waiver of*.—When an appeal is taken to this court from a judgment or order of the probate court, and the proceedings of that court are afterwards removed by *certiorari* at the instance of the appellant, into the circuit court, this is a waiver of the appeal, and it will be dismissed.

Appeals from the circuit and probate courts of Talladega County, respectively heard before Hon. Leroy F. Box, Judge, circuit court; and the Hon. George K. Miller, Judge, Probate Court.

Messrs. Henderson & McAfee, and Bishop & Whitson, counsel for Miller; Messrs. Bowden & Knox, and Parsons & Parsons, contra.

On Sept. 2, 1885, Charles S. Jones, filed his petition in the probate court of Talladega County, and moved the court to quash and annul the election held in said county, on August 3, 1885, "for prohibition" or "against prohibition," as provided for, in the act of the general assembly, entitled: "An act to regulate the sale, giving away or otherwise disposing of spirituous, vinous or malt liquors or intoxicating bitters, or patent medicines" having alcohol as a base, in Talladega County; "approved, Dec. 11, 1884." Acts of Ala. 1884-5, p. 234. At a subsequent day an order was made denying the said petition on the ground that the court of probate had no jurisdiction thereof, from this order an appeal was taken to this court.

Pending the appeal in the above case, the said Jones, on the 12th day of Nov., 1885, filed his petition in the circuit court of said county, praying for a writ of *certiorari* directed to said Miller, Judge, etc., commanding him to certify to said court, the petition filed in his said court, and matters pertaining thereto; and that the said circuit court would make an order, vacating and annulling the said election. The said writ was granted on the 13th of Nov., 1885: and the respondent moved to dismiss the same on various grounds which will be found in the opinion following. The said motion was overruled, and the judgment of the court entered, declaring, said the election void, from which this appeal is prosecuted.

CLOXTON, J. Delivered the opinion of the court:

All judicial tribunals possess the inherent power to vacate, at any time any order made by them which is void on its face. Such vacation will be made by the court where the order is made, on motion by any party having an interest. *Glass v. Glass*, 76 Ala. 368; *Baker v. Barclift*, 76 Ala. 414. If the order for the election is void on its face, and the application to vacate it, was properly made, in the first instance to the judge of probate, whose power and duty were, in such case, to quash the proceedings. *Savage v. Wolfe*, 69 Ala. 569. The primary purpose of the *certiorari* is to remove into the circuit court for revision, the order of the judge of probate, denying the petition and motion to vacate his order for the election, and to quash the proceedings. To enable the circuit court to act intelligently and advisedly, it was necessary that the subject matter, on which the action of the judge of probate was invoked, and all the proceedings relating thereto—that is, that the whole case should be certified; so that the circuit court could determine, on an inspection of the record, whether the judge of probate had jurisdiction to order the election and fix a time for holding the same. They were correlative matters. The *certiorari* is not obnoxious to the objection, that it unites in one writ to distinct orders.

The functions of the writ of *certiorari*, at common law, extended to question of the jurisdiction of the inferior tribunal, as well as to the regularity of the proceedings. Its office is to correct errors of law apparent on the record. The trial is not *de novo*, unless expressly provided by the statute. The statute under which the judge ordered the election, create a new jurisdiction. He acts in a summary manner, and in a course different from the common law. No method is provided by which his action may be reviewed. In such case, *certiorari* is the proper remedy, and the circuit court, by virtue of its statutory authority to exercise a general superintendence over all inferior jurisdictions, is the proper court to supervise the proceedings. *McAllilley v. Horton*, 75 Ala. 491. *Town of Camden v. Blotch*, 65 Ala. 236.

It will be conceded, that no one is authorized to become a party to judicial proceedings, and sue out a *certiorari*, who has not an individual interest in the subject matter, which is affected by the proceedings. The interest must relate to him separately from the public. It must be a private right or privilege which appertains to him, and which, being in his private keeping, he is authorized to vindicate. An interest or right, which he holds in common with the rest of the community, is not sufficient. It is contended that Jones had no such personal and separate interest. He is a member of a firm to which a license was issued about May 1, 1885, by the judge of probate, to carry on the business of retailing liquors, which did not expire until January 1, 1886; and was engaged in the business at the time the order for the election was made, and the election was held. Whilst a licensee to engage in the business of the retail of liquors is

not a contract, but is a permit revocable at the will of the legislature; it is nevertheless a personal privilege of value, whatever may be the estimate of the moral character of the business. If the judge of probate made a valid order for an election under authority of a valid statute, the election held in pursuance thereof having resulted in favor of prohibition and having been duly published, operates to revoke his license, and to convert what is otherwise a lawful and authorized business into a criminal offense. As such would be the effect of the proceedings if valid, Jones is entitled to test, in any legal mode, their validity as a revocation of his license. His is a legal interest, relating to him individually, which he holds separate and distinct from the rest of the people of the country.

It will not be disputed that the legislature and the agencies employed in the enactment of laws are independent of judicial interference, and the courts will not review acts which are legislative. The State government is divided into three distinct departments, and no person, being of one of the departments, can exercise any power belonging properly to either of the others, unless expressly directed or permitted by the constitution. Though the abstract proposition asserted by counsel is correct, it is inapplicable and without foundation. Assailing a statute as unconstitutional is not an effort to review a legislative act, and the and the statute does not undertake or purport to delegate legislative power to the judge of probate. Such delegation is prohibited by the constitution. The office of the legislature was performed when the act, having passed both houses of the General Assembly, was approved by the Governor. The act then became a complete law, only its operation being suspended until the happening of the contingency prescribed by the statute. Judicial, and not legislative power, is conferred on the judge of probate.

Having ascertained that the circuit court acquired jurisdiction by a proper proceeding instituted by an authorized party, the further inquiry will be addressed to the question of error *vel non* in the judgment from which the appeal is taken.

We assume as a postulate, that the record of every court of statutory limited jurisdiction must affirmatively discover every fact essential to the validity of its orders or judgments. The proceeding to obtain an election under the act is statutory, creating a new, special and limited jurisdiction, not covered by the grant of general jurisdiction to the probate court, and not previously exercised by the judge. To put this new jurisdiction into exercise, the preliminary and essential facts must affirmatively appear. *Tally v. Grider*, 66 Ala., 119; *Savage v. Wolfe*, 69 Ala., 569. The statute prescribes and defines the jurisdictional facts:

"Whenever fifty or more resident householders and freeholders of Talladega county file in the office of the judge of probate of said county, a petition in writing, praying for an election, to ascertain the wishes of the people of said county as to

the prohibition of the sale of intoxicating liquors in said county, it shall be the duty of said judge to order an election and fix the time for holding the same."—Acts 1884-85, 234. [A petition, signed by fifty or more persons, stating that they are resident householders and freeholders of the county, and praying for an election, filed in the office of the judge of probate is indispensable to put the proceeding in motion. It is insisted that "and" should be construed as "or." "And" and "or" may be convertible words, when required by the sense of the statute; otherwise they will be taken as ordinarily used and understood. The object of the legislature was to guard the people against being unduly precipitated into an exciting election, and therefore required that at least fifty persons should pray for an election, who are residents of the county, and possess the qualifications of both freeholders and householders, in whom are combined the interests of permanency in the value of real property, and of protecting and preserving domestic peace and prosperity. Such are the qualifications of the petitioners prescribed by the legislature, and we are not authorized to dispense by construction, with either of them.

Two petitions were filed. One of them states, that the petitioners are resident freeholders and householders of the county, and otherwise substantially complies with the requirements of the statute: but is signed by only thirty persons. The other, though signed by a sufficient number, fails to aver that the petitioners are householders, and does not pray for an election to ascertain the wishes of the people of the county. It is urged that the two petitions should be considered as amendatory of each other. It may be, that it is not necessary for all the petitioners to sign one petition; that different petitions signed by different persons is a substantial conformity to the statutes; but in such case, each petition should contain averments of all the jurisdictional facts. A consolidation of all will not operate to supply fatal omissions in any one. If the two petitions be considered as an amended petition, there is still an omission of the averment that fifty or more of the petitioners are resident freeholders and householders of the county, and it is inoperative to put into exercise the statutory jurisdiction of the judge of probate to order an election and fix the time for holding the same. His order was *coram non iudice*, and the entire proceeding a nullity.

The constitutionality of the statute, under authority of which the election was held, is also assailed. While the exigencies of the case do not require the consideration of this question, another election under authority of the act would probably necessitate its determination; and if unconstitutional, a present decision may promote the public weal, and discover the necessity of such legislation, as the people may desire, and the General Assembly may deem proper and expedient.

Sec. 2, of art. 4 of the Constitution provides: "Each law shall contain but one subject, which

shall be clearly expressed in its title." This clause has been repeatedly considered by this court, and received a full and elaborate discussion in *Ballentyne v. Wickersham*, 75 Ala. 533. It was held, that the clause is mandatory, though its requirements should not be so exactly enforced as to embarrass or obstruct legislation. One of the purposes is, to prevent enactments relating to subjects, of which the title gives no intimation, thereby deceiving the legislature by alluring or misleading titles. The inhibition is not directed against the generality or comprehensiveness of the subject expressed in the title; but the constitutional requirement is, whether it be specific or general, the title shall so clearly express the subject as not to mislead or deceive. *Robinson v. Mont. M. B. & L. Astn.*, 69 Ala. 412; *Carson v. State*, 16 Ala. 235.

The title of the act is, "An act to regulate the sale, giving away or otherwise disposing of spirituous, vinous or malt liquors, or intoxicating biters, or patent medicines having alcohol as a base, in Talladega County." But one subject is expressed in the title—the regulation of the sale, giving away or otherwise disposing of liquors—and the inquiry is, does the title express the subject contained in the enactment; in other words, are regulation and prohibition the same or distinct subjects? *Regulate* and *prohibit* have different and distinct meanings, whether understood in their ordinary and common signification, or as defined by the courts in construing statutes. Power granted to a municipal corporation to grant license to retailers of liquors, and to regulate them does not confer power to prohibit, either directly or by a prohibitory charge for a license. *Town of Marion v. Chandler*, 6 Ala. 899; *Ex parte Burnett*, 30 Ala. 461. In *Joseph v. Randolph*, 71 Ala. 499, it is said; "A constitutional right, though subject to regulation, cannot be impaired or destroyed, under the device or guise of being regulated." To regulate the sale of liquor implies, *ex vi termini*, that the business may be engaged in, or carried on, subject to established rules or methods. Prohibition is to prevent the business being engaged in or carried on, entirely or partially. The two purposes are incongruous. A title, which expresses a purpose to regulate, gives no indication of a purpose to absolutely prohibit. We are constrained to hold the act unconstitutional.

In *Miller v. Jones* the judgment of the circuit court must be affirmed.

The case of *Jones v. Miller*, which was submitted at the same time, is an appeal from the judgment of the probate court denying the motion to vacate the order for an election, and to quash the proceedings. After the appeal was taken, but before the transcript was filed in this court, the *certiorari* was sued out, and the judgment of the circuit court obtained. This was a waiver of the appeal, and it must be dismissed.

NOTE.—The main point in the principal case [relates to the constitutionality of the enactment of the law in

question. That is, whether the provisions of the State Constitution relating to the title of subjects of statutes were complied with, in the enactment of the laws. The court did not pass upon the constitutional power of the State to prohibit the sale and manufacture of intoxicating liquor; that seemed to be conceded. But whether conceded or not in this particular case—the point being unnecessary to a determination from the position taken—the proposition is no longer questioned.<sup>1</sup>

"Each State may, under its inherent police power and upon principles of public policy, prohibit the manufacture, importation, or sale of liquors, or may regulate its traffic to any extent or in any manner it may deem judicious by license or otherwise."<sup>2</sup>

The State may enact that this restrictive legislation shall operate throughout the State, or it may refer the matter to the people of the several subdivisions, leaving it optional with the people of the various districts whether or not high or low license, or prohibition shall prevail in their respective localities. This intention may be embodied either in the State Constitution, or it may be left with the legislature.

This "local option" system, as it is usually designated, is a special feature in the police regulations of many States. The Constitution of Texas contains a provision for a reference of prohibition and license questions to the people of the several counties, cities, towns and precincts.<sup>3</sup> Many other States have similar constitutional or statutory provisions.<sup>4</sup>

Not only in the enactment of laws regulating or prohibiting the traffic in intoxicating liquors, but in all others, the legislature is strictly limited to the methods pointed out in the fundamental law. This principle is also true with reference to any proposed change of the fundamental law itself. The method previously agreed upon must be followed.<sup>5</sup>

The fundamental law of Alabama provides that the subject of every law "shall be clearly expressed in its title."<sup>6</sup> The title of the law in question recited that it was "An act to regulate the sale," etc. of spirituous liquors, while the law itself undertook to prohibit all sales, etc. The court properly held that "regulate" and "prohibit" were not convertible terms, and therefore the proposed law was unconstitutional, because the title thereof did not clearly express its subject matter.

Abstracts of the constitutional provisions of the various States, relating to the title of subjects of statutes, will be found in *Sedgwick on Construction of Statutory and Constitutional Law* (Pomeroy's 2nd ed.), p. 518, note (a.).

The Constitutions of Nebraska, Ohio and Kansas, are the same as that of Alabama, in its requirements that each law shall contain but one subject, which shall be clearly expressed in its title.<sup>7</sup> Some Constitutions merely provide that the subject of the statute shall be embraced in the title as in Ark. V, § 22, and Minn. IV, § 27. This restriction is sometimes confined to private or local statutes, as in provisions for sala-

<sup>1</sup> *Foster v. State*, 32 Kans. 765; *License Cases*, 5 How. 504; *State v. "Our House"*, 4 Green (Ia.), 170; *State v. Denehey*, 8 Iowa, 396; *State v. Bartmyer*, 31 Iowa, 601; *Ovitt v. Pond*, 29 Conn. 479; *Commonwealth v. Howe*, 13 Gray (Mass.) 26.

<sup>2</sup> Article of Wm. L. Murfree, Sr., in 7 *Crim. Law Magazine*, 155.

<sup>3</sup> Const. Texas, art. XVI, § 20; *Halley v. State*, 14 Tex. App. 505; *Donalson v. State*, 15 Id. 25.

<sup>4</sup> *Williams v. Citizens*, etc., 49 Ark. 290; *State v. Brown* 19 Fla. 563, 593.

<sup>5</sup> *Koehler v. Hill*, 60 Iowa, 543.

<sup>6</sup> Const., art. IV., § 2.

<sup>7</sup> Kans. II, § 6; Neb. II, § 19; Ohio, II, § 16.

ries of officers, etc.<sup>8</sup> In a few States, as in Missouri, Iowa, Illinois, etc., if the act violates this requirement, it is made void "only as to so much thereof as shall not be so expressed."<sup>9</sup>

Such provisions should not be given a "too rigorous and technical construction," but the evil to be avoided, resulting from a violation of the constitutional provisions, should guide the interpretation. The general rule of interpretation, is that the title should fairly indicate the general subject of the statute, but need not give an abstract of its contents; nor need it mention the means, methods, or instruments by which this general purpose is to be accomplished; nor need it express matters which are merely incidental to this subject.<sup>10</sup> In *Ind. Cent. R. R. v. Potts*,<sup>11</sup> it is said that the title should give the means rather than the end, and should be reasonably particular. But Pomeroy says, that this is opposed to the general rule. "The adjuncts and *modus operandi* need not be stated." Id. The title should never be misleading, as it seems to have been so held in the principal case.<sup>12</sup> The appropriateness of the title is not material, although another might have been much better, yet if the one employed is not misleading, it is sufficient.<sup>13</sup> A slight inaccuracy in the title will not avoid the act.<sup>14</sup> The title of a local option law was as follows: "An act to provide a local option law for the incorporated cities, towns, and villages of this State." A section of the law provided that the act should "not apply to any city, town or village in which the sale of ardent spirits is now, or shall hereafter, be prohibited by legislative enactment." Here it was held, that the subject-matter of the above section was sufficiently expressed in the title of the act, and that both related to one subject, to-wit: "local option."<sup>15</sup>

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<sup>8</sup> As in *Fla. IV*, § 30; *Oregon, IX*, § 7; *N. Y. III*, § 16, and *Wis. IV*, § 14.

<sup>9</sup> *Mo. IV*, § 32; *Iowa, III*, § 29; *Ill. IV*, § 3; *Ind. IV*, § 19; *Oregon, IV*, § 20.

<sup>10</sup> *Sedgwick's Construction of Stat. & Const. Law* (Pomeroy's ed.), p. 520, note; *Antonia v. Lane*, 32 Tex. 405; *People v. Lawrence*, 41 N. Y. 137; s. c., 36 Darb. 177. 11 7 Ind. 681.

<sup>12</sup> *Durkee v. Janesville*, 26 Wis. 697; *People v. Com.*, 53 Barb. 70; *People v. Mellen*, 32 Ill. 181.

<sup>13</sup> *Commonwealth v. Green*, 58 Pa. St. 226; *People v. McCalhoun*, 1 Neb. 182.

<sup>14</sup> *State v. Elvins*, 32 N. J. L. (3 Vroom.) 362. See further *Joekers v. Borgman*, 99 Kan. 109, 113; *Burroughs v. Commissioners, etc.*, Id. 197; *State v. Curtis*, Id. 385; *Felham v. Woolsey*, 16 Fed. Rep. 418; *Re Upson*, 89 N. Y. 67.

<sup>15</sup> *State v. Chester*, 18 S. C. 464. See also *Carson v. State*, 69 Ala. 235, for a similar ruling. See also *State v. Taylor*, 34 La. Ann. 978; *Bitters v. Fulton County Comr.*, 81 Ind. 125; *Miller v. Hurford*, 13 Neb. 13; *State v. Herman*, 11 Mo. App. 43; *Jonesboro v. Cairo & St. Louis R. Co.*, 110 U. S. 192; *Otoe County v. Baldwin*, 111 U. S. 1; *State v. Newton*, 45 N. J. L. 469; *Knoxville v. Lewis*, 12 Lea (Tenn.) 120; *State v. Wilson*, 12 Id. 246.

## WEEKLY DIGEST OF RECENT CASES.

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VIRGINIA,	14

1. AGENCY.—*Adopting Part of Agent's Contract—Vendee to be "Satisfied."*—The defendant gave a written order to the plaintiffs through their agent for an organ. The agents seasonably carried an organ, substantially like the one ordered, to the defendant's house; but in the meantime he had bought another and refused to receive the plaintiffs'. Negotiation ensued, and the agent gave the defendant to understand, and he did understand, that if he would let the organ be set up, the trial should be at an end, if he was not satisfied with it. Afterward the defendant, without cause, thought that he was dissatisfied with its tone, and so notified the agent. Held, in action of book account, that the plaintiffs by claiming a delivery adopted a part of the agent's last transaction, and thereby the whole of it. While the vendee was bound to act honestly and give the instrument a fair trial, without feigning dissatisfaction, it was incumbent on the plaintiffs, in order to recover, to prove that the defendant was satisfied with the organ; and it was not enough to show that he ought to have been, and that his dissatisfaction was without good reason. *McClure Bros. v. Briggs*, S. C. Vt., Feb. 20, 1886, Eastern Rep.

2. ——. *Proof—Superintendent—Corporation—Title—Letter—Voucher—Tender—Liability—Contract—Performance—Payment.*—There must be proof of agency, either expressed or implied, to render a principal liable, but the fact cannot be proven by the declaration of the alleged agent, nor by his acts done without the knowledge or authority of the principal. Where, however, some evidence of the agency has been first given, it is competent to give the acts and declarations of the alleged agent, respecting the subject-matter of his authority. It is error to submit to a jury for determination the scope of an agent's authority, from the mere fact that he was superintendent of a company, and, after admitting proof of the manner in which, in specific instances he was held out to the world, to exclude the evidence of his particular instructions from the company. The object and design of a private corporation are not to be ascertained in its corporate title. Where a telephone company received poles for the establishment of a line, under an agreement to supply said poles by a person who sub-contracted with a third party to deliver them to the company, there is no liability on the company's part to the third party in making a voucher in his name, until it has been accepted. When such voucher has been delivered to the original contractor, and he has ten-

dered it to the third party in discharge of his own debt, and the tender having been refused, the voucher is handed back to the company, said third person cannot afterwards bring suit against the company thereon. When it appears that the parties to a contract have mutually dispensed with full performance of the same, or have modified the terms thereof, the defense cannot be set up that payment was only to be made, when the contract had been fully and completely performed according to the original stipulations. *Central, etc. Co. v. Thompson*, S. C. Pa., Feb. 15, 1886, Weekly N. of Cas.

3. **BILLS OF EXCHANGE.**—*Acceptance by Executor of Draft, to be Paid out of Estate, Makes him Personally Liable—Mention of Fund in Draft—Liability of Parties.*—Plaintiff claims to recover as the holder of a draft drawn on "Adam Simon, executor," for \$900, and interest, payable July 1, 1879, to be charged to maker "against me, and of my mother's estate." Defendant accepted, adding the word "executor" to his name. Plaintiff was nonsuited, on the ground that defendant was not liable personally, but, if at all, in his representative capacity; and that it was payable out of a specific fund which had not been shown to exist. *Held*, error; that if an administrator or executor makes, indorses, or accepts negotiable paper, he will be held personally liable, even if he adds to his own name the name of his office. The mere mention of a fund in a draft does not necessarily deprive it of the character of commercial paper, but it must further appear, in order to have that effect, that it contains either an express or implied direction to pay it therefrom, and not otherwise. That this was a contract to pay a fixed amount at a specified date absolutely and unconditionally, and rendered the parties executing it liable absolutely for the amount stated therein. *Schmittler v. Simon*, Court of Appeals New York, March 9, 1886, N. E. Rep.

4. **CONTRACT.**—*Ambiguity—Construction.*—Where there is neither patent nor latent ambiguity in a written contract, parol evidence is inadmissible to add to or take from the language used, and to give any other meaning to the contract than its language imports. Under a contract disposing of all the hard wood on a certain tract of land, to be removed by the purchaser within a fixed number of years, it is not reasonable to suppose that the parties intended to except sprouts or young trees, no such exception being expressed. *Long v. Meller-ton, etc. Co.*, Court of Appeals New York, Jan. 26, 1886, Cent. Rep.

5. **CRIMINAL LAW.**—*Homicide—Murder—Self-Defense—Hostile Demonstrations by Deceased.*—Where, on a trial for murder, it appeared that the parties were engaged in gambling, and that defendant bet, and put his money on the table, but subsequently, claiming that he did not have money enough to make good his bet, withdrew the money, upon which deceased, with a knife in his hand, demanded that the money be replaced, and that defendant then drew his pistol, which deceased seized, and in the struggle over it, deceased was shot, it was held that instructions of the court to the effect that if defendant could have avoided the necessity of killing the deceased by replacing the money, it was his duty to have done so, are erroneous; and the defendant's withdrawal of the money did not justify any act or demonstration of hostility on the part of deceased, or modify the right of

defendant to meet and repel such act or demonstration by adequate and proper means. *People v. Scott*, S. C. Cal., March 8, 1886, Pac. Rep.

6. **CRIMINAL LAW.**—*Murder—Evidence of Contradictory Statements—Meaning of Words Used—Striking out Evidence—Re-direct Examination—Evidence—Duty of Jury as to Fixing Punishment—Instructions—Failure of Jury to fix Punishment.*—In a prosecution for murder, where a witness for the defense testifies to facts from which the jury might infer, that the deceased left his house on the day of the homicide, for the purpose of bringing about an encounter between the defendant and himself, he may be cross-examined by the prosecution as to any former statements made by him relative to the matter inconsistent with his direct testimony, and to any matter connected with it tending to show the mental condition of the deceased towards the defendant. In such case, a witness cannot testify as to his understanding of the meaning of words used by another, or to inferences drawn by him from a combination of circumstances tending to throw light on the question of feeling between the defendant and the deceased. That is a matter for the jury, upon proof of the words or circumstances themselves. If such testimony is stricken out, and the jury instructed to disregard it, no error prejudicial to the defendant is committed. A witness for the prosecution may testify, on redirect examination, as to a statement made by the defendant relating to and connected with the circumstances of the homicide, as detailed on the examination in chief and on his cross-examination. In a prosecution for murder, the jury, after agreeing to find the defendant guilty of murder in the first degree, were unable to agree upon the punishment; they thereupon came into court, and the judge instructed them explicitly, that they had the right to fix the penalty at death, or imprisonment for life, or to bring in a verdict of guilty of murder in the first degree without specifying the penalty; the jury subsequently returned for further instructions, when the judge again charged them as above stated, adding, "If there is nothing specified in your verdict as to the penalty, the court will have its duty to perform, but what that duty will be the court will not say." The jury subsequently brought in a verdict of guilty of murder in the first degree, without specifying the penalty. Counsel for the defendant then stated to the jury that the effect of their verdict was to hang the defendant, whereupon one of the jurors said, "If that is the effect of the verdict, it is not my verdict." Upon polling the jury, such juror, after considerable hesitation, consented to the verdict and stated that he left "the responsibility to the court." *Held*, that the instructions were without error, as the jury could not have been misled thereby on the question of punishment. A person, convicted of murder in the first degree, cannot escape punishment because the jury that convicted him by a valid verdict may have disagreed upon the question of punishment, or, which is equivalent to the same thing, returned a verdict which was silent as to the penalty. *People v. Erritch*, S. C. Cal., March 26, 1886.—W. C. Rep.

7. **CRIMINAL LAW.**—*Amendment of Information—Plea—Arraignment.*—The information as filed, to which the defendants pleaded not guilty, stated no defense, for the reason that the day of the alleged commission of the offense was a day after the ac-

cusation was made. After a jury was impaneled the information was amended, by alleging commission of the offense on a day prior to the filing of the information. The trial thereupon proceeded without an arraignment or plea to the information as amended. *Held*, error: that the defendants should have been arraigned and called on to plead to the amended information. *People v. Moody*, S. C. Cal. March 29, 1886.—W. C. Rep.

8. CRIMINAL LAW.—Homicide—Self-Defense—Duty to Retreat—Justifiable Homicide—Evidence—Dying Declarations.—Ordinarily, when a party is assaulted by another, he must retreat before he is justified, in repelling such assault, in taking the life of his assailant; but where an assault is made with a dangerous or deadly weapon, and in so fierce a manner as not to allow the party assaulted to retire without manifest danger of his life or great bodily injury, he is not required to retreat; and if the character of the attack is such that a prudent man he would believe that the assailant intended to take his life, or inflict upon him great bodily injury, and, acting under such belief, he kills his assailant, the killing will be justifiable. A statement made by the party shot, to his physician, in answer to a question as to whether the shooting was purposely done, is not admissible. *State v. Donnelly*, S. C. Iowa, March 20, 1886, N. W. Rep.

9. CRIMINAL LAW.—Defense of Insanity in Murder—Intoxication—Uncontrollable Impulse—Evidence.—In order to make out the defense of insanity, sufficient proof must be shown to overcome, by the preponderance of evidence, the presumption of sanity, and any other proof that may be offered, so as to show a want of sanity with reasonable certainty—this degree of evidence on the part of the defendant, answering to and satisfying the requirement that the State must establish every element of the crime charged "beyond a reasonable doubt." The evidence in this case does not prove that the defendant was in a state of temporary intoxication when he committed the crime, but if it did, this would not be a defense, as voluntary drunkenness of whatever degree, is no excuse for crime committed under its influence. The difficulty is great, if not insuperable, of establishing by satisfactory proof whether an impulse was or was not uncontrollable. But there was nothing in this case requiring the circuit judge to enter upon this subject. He correctly charged the jury as follows: "In order to relieve himself from responsibility for a criminal act by reason of mental unsoundness, the prisoner must show that he was under a mental delusion by reason of mental disease, and that at the time of the act he did not know that the act he committed was wrong, or criminal, or punishable, either the one or the other. Because, notwithstanding his mind may be diseased, if he is still capable of forming a correct judgment as to the nature of the act as to its being morally or legally wrong, he is still responsible for his act and punishable as if no mental disease existed at all." *State v. Bundy*, S. C. So. Car., March 20, 1886, So. Law Times.

10. CONTRACT—Fraud—False Representations Made in Ignorance—Elements of Fraudulent Representation.—The law holds a contracting party liable as for a fraud on his express representations concerning facts material to the treaty, the truth of which he assumes to know, and the truth of which is not known to the other contracting party, where

the representations were false, and the other party, relying upon them, has been misled to his injury. It is not necessary, in order to constitute a fraud, that the party who makes a false representation should know it to be false, if such party made the false representation not knowing whether it was false or not. *Stimson v. Helps*, S. C. Colo., Feb. 26, 1886, Pac. Rep.

11. DEED—Construction—Latent Ambiguity—Evidence—Where one part of the description of a deed requires a lane at a certain distance to be taken as a boundary, and another part calls for a lane at another distance as the same boundary, and two lanes are shown to have been in existence at the date of the deed, but neither is designated therein by name, there is a latent ambiguity, to explain which parol testimony is admissible. Which of the two lanes was intended as the monument was a question for the jury. *Thornell v. Brockton*, S. C. Mass., February 24, 1886.—New Eng. Rep.

12. DIVORCE—Alimony—Equity—Pleading—Fraud—Courts of equity exercise a jurisdiction over the subject of alimony, not merely incidental, but original, in cases where the wife's right of maintenance exists, because of the unquestionable duty of the husband to support the wife, and the inadequacy of legal remedies to enforce this duty. The wife can attack for fraud any transfers, or alienations of property made by the husband with intent to defeat her claim, and such grantees may be made defendants to the suit for alimony. The bill is not rendered multifarious by reason of the joinder of the several fraudulent grantees as co-defendants in the suit; such transfers spring out of a common purpose, and the purpose of the suit is single to obtain satisfaction of the demand out of the debtor's property. *Hinds v. Hinds*, S. C. Ala., Dec. 1885.—South. Law Times.

13. EQUITY—Cancellation of Written Instrument—Fraudulent Misrepresentations—A. conveyed to B., by warranty deed, a parcel of land, the southerly boundary of which, as stated in the deed, was as follows: "To a stake and stones on the shores of Penobscot bay; thence southwesterly by said shore, to the extremity of 'Squam Point,' so-called," etc. By a prior deed C. had a right of fishery in the waters on that side of said land, with all privileges necessary for carrying on the same, and this was not mentioned in A.'s deed to B. An action of trespass had been brought by C. against B., and judgment recovered, but damages had not been assessed or execution issued. Thereupon B. represented to A. that, by reason of the covenants contained in his deed, A. was liable to pay whatever judgment and costs should be recovered against B. in the trespass suit, and A. thereupon executed a bond to B. for the payment of the same. Upon a bill in equity brought by A. against B. to cancel said bond, *held*, that the alleged statements constituted a representation of the law, rather than a misrepresentation of any fact, and, under the circumstances disclosed in the case, did not amount to fraud such as a court of equity would take cognizance of. *Abbott v. Treat*, S. C. Me., Feb. 2, 1886.—Atl. Rep.

14. EVIDENCE—Hearsay—Previous Statements of Witness.—When it is sought to discredit a witness upon the ground that his testimony is given under the influence of some motive prompting him to make a false or colored statement, the party calling him may show in reply that the witness made sim-

ilar statements at a time when the imputed motive did not exist. *Howard v. Commonwealth*, S. C. App. Va., March 11, 1886.—Virginia Law Journal.

15. **EMINENT DOMAIN**—The right of a railroad company to the use of the land condemned for its right of way is a continuing right to all uses necessary and incidental to the safe and beneficial occupation of its roads, by raising or lowering grade, cutting down hills, and removing trees: and where it is owner of the fee by deed of conveyance from the original owners, it has all the rights that any other owner of the fee would have, so long as it does not infringe any common land rights of adjacent owners, without being liable to further damages for cutting off natural drainage, discharging surface water from its road bed, and shutting off the view, light and air from adjoining premises. *Cassidy v. Old Colony, etc. R. Co.*, Feb. 25, 1886, S. C. Mass., New Eng. Rep.
16. **FIXTURES**—A portable boiler and engine, not attached to the realty, except that they were belted to the main shaft, but not removable, except by removing a shed built over them, or by taking off some boards to enlarge the opening into the factory, the machines being fastened to the floor by cleats, screws or nails, are not, as matter of law, permanent improvements to the building.—*Curpenter v. Walker*, S. C. Mass., Jan. 5, 1886—New Eng. Rep.
17. **INSURANCE, LIFE**—*Failure to pay Premium—Beneficiary to Participate in Profits—Failure of Company to Give Notice of Dividend—Husband as Agent for Wife—Attempt by Husband to Surrender Policy—Failure to Tender Premium After Death of Insured*—Where, by the terms of a contract of life insurance, the beneficiary named in the policy is entitled to participate in the profits, a portion of which, in the form of dividends, is to be applied each year in reduction of premiums, and it has been the uniform practice of the company to give timely notice of the amount of premium, amount of dividends, and of the balance to be paid in cash, and the company neglects to give such notice, having knowledge of the residence of the beneficiary, and by reason thereof the premium is not paid at the time specified in the policy, the company cannot set up such failure to pay as a defense to a recovery upon the policy, although by its terms the same is to be forfeited in case of failure to pay a premium upon any of the dates stipulated therein. In such case, where the company has uniformly sent the notices to the insured, (the husband of the beneficiary,) and he has made payment of premiums from year to year, the law will treat him, in making such payments, as agent for the wife; but where it is shown to the company, by letters from the husband, very shortly after notice sent, that he and the wife have separated, she having commenced a proceeding for alimony against him, and that he is desirous of having the policy changed, and made payable to his estate, the company is not justified in treating him as her agent, for the purpose either of receiving notice for her, or of making a surrender of the policy. And in such case an attempt by the husband, without knowledge of the wife, to surrender the policy to the company, is inoperative, and the rights of the wife are not thereby impaired. Where, in such case, the company repudiates the contract, and by its course of conduct clearly indicates that a tender of the premium after the death of the insured, if made, would not be accepted, a failure to make

such tender will not bar a recovery on the policy. *Manhattan, etc. Co. v. Smith*, S. C. Ohio, March 9, 1886.—N. E. Rep.

18. **JUDGMENT—When Conclusive—Administrator—Order of Sale**—The conclusive effect of a judgment against a decedent cannot be controverted, in a proceeding before the Orphans' Court to compel decedent's administrator to sell property to satisfy the judgment. An order of the court below, decreeing the sale of a decedent's real estate under a judgment valid on its face, sustained, even although the claim upon which the judgment was founded had been once proven against decedent's estate, in bankruptcy proceedings, and the real estate sold under the decree had been acquired subsequent to those proceedings. *Bucknor's Appeal*, S. C. Penn., Feb. 6, 1886.—Cent. Rep.
19. **MISTAKE—Will—Estoppel—Real Estate—Compensation for Improvements**—Testator gave his wife certain lands for her life, and provided that at her death, they be sold by his executor, and "the proceeds thereof be divided into seven parts; one-seventh of which I give to the children of my brother, Thomas, who may be living at the death of my wife, one-seventh to the children of my brother, Robert, who may be living at the last mentioned time; one-seventh to each of my brothers and sisters hereinafter mentioned, that is, Robert, John, Edward, Mary, Jane and Diana"—making eight specified persons or classes. The life-tenant died in 1879, and in a suit brought in 1881 to construe the will and sell the land, it was contended that Robert's name should be stricken out of the will. *Held*: A court of equity has power to correct the mistake in the will. It was the intention of the testator to divide his estate among the designated persons or classes, rather than into any particular number of parts, and Robert is entitled to his share. Robert had no cause of action, and no claim which he was called upon to assert, until the death of the life-tenant, and he cannot be said to have acquiesced in any contrary construction of the will. A case in which under the circumstances, *held*, that the appellants are not entitled to compensation for permanent improvements put upon the land by them. *Effinger v. Hall*, S. C. App. Va. Nov. 19, 1885.—Va. Law Jour.
20. **MASTER AND SERVANT—Negligence of Co-Servant—Contributory Negligence—Master Liable if he Leaves Choice of Means to Servant—Knowledge of Defects**—Plaintiff was unexpectedly called from his work to assist a co-servant, and, stepping upon a platform which the latter assured him was safe, fell through and was injured. *Held*, that the question of his contributory negligence should have been left to the jury. The master is chargeable, ordinarily, with knowledge of the means necessary to be employed in performing his work; and when their procurement and selection is delegated to a servant, he stands in the place of the master in discharging those duties, and the servant's neglect in that office is chargeable to the employer as an omission of duty enjoined upon him. Ignorance of the master of the defects in the instrumentalities used by his servants in performing his work is no defense to an action by the employee who has been injured by them, when, by the exercise of proper care and inspection, the master could have discovered and remedied the defects, or avoided the danger incident therefrom. *Bensing v. Steinway*, Ct. of App. New York.—N. E. Rep.

21. **NEGLIGENCE.—Injury at Crossing—Negative Evidence as to Non-Ringing of Bell at Crossing—Contributory Negligence—Looking both Ways.**—Evidence was received, in action for injury by a train at a crossing, from two passengers upon the train, who were in such position that it would not have been impossible for them to have heard the signal, that they did not hear the bell ring. *Held*, no error. It is for the jury to say whether or not plaintiff made the effort, in crossing the track, which a prudent person would make in like circumstances—whether she looked exactly at the right moment, or in each direction in proper succession, or from the place most likely to afford information, cannot be determined as matter of law; and the court was bound to submit to the jury as to whether defendant exercised due care. *Greany v. Long Island R. R. Co.*, Court of Appeals, New York, March 2, 1886, N. E. Rep.

22. ———. **Contributory Negligence—Ordinary Care—Warning.**—The neglect of a traveler approaching a railroad crossing, to stop, look and listen and exercise that caution which a reasonable man would take to avoid danger under the circumstances, constitutes such contributory negligence as will prevent a recovery of damages, in case he is injured. Negligence is want of ordinary care, under the circumstances and is a question for the jury. Whether the ringing of a locomotive bell, without blowing the whistle in time to avoid danger, is a sufficient warning of the approach of a train to a public crossing, is generally, in actions for negligence, a question for the jury. *Pennsylvania, etc. Co. v. Coon*, S. C. Pa., Jan. 25, 1886, Cent. Rep.

23. **NEGLIGENCE—Practice—Special Verdict.**—1. Where, upon an issue involving negligence, the principal facts are determined by the jury in their special verdict, all dispute as to the facts is concluded and it then becomes the function of the court to decide as a question of law upon the facts found, whether or not the party to whom negligence was imputed was negligent. The jury cannot draw inferences, in the nature of legal conclusions, upon the facts found. After the facts are ascertained, negligence is no longer a mixed question of law and fact. 2. Plaintiff stood upon a street crossing at the usual place where passengers were taken up, and one street car passed rapidly without slackening its speed, and upon his giving a signal, the next car approaching rapidly was moved slowly past the crossing, as was customary for receiving male passengers, but on the plaintiff attempting to enter, the animals drawing it were struck by the driver, and the car being jerked violently, the plaintiff was thrown therefrom. *Held*, that the company owning the car was guilty of negligence and liable for the injury inflicted. *Conner v. Citizen's, etc. R. Co.*, S. C. Ind., Jan. 26, 1886.—W. Rep.

24. **NEGOTIABLE PAPER—Bona Fide Purchaser.**—The purchaser of a negotiable note, before maturity, and for valuable consideration, is not bound to inquire of the maker whether there is any defect in it, or defense against it: but is entitled to protection, unless there was bad faith in his purchase, or such gross negligence as is evidence of bad faith; and his purchase for value before maturity being shown, the onus of proving notice is on the maker. *Wildsmith v. Tracy*, S. C. Ala., December Term, 1885.—South. Law Times.

25. **PARTNERSHIP.—Evidence—Knowledge of Third Parties.**—When in an action it is sought to charge the defendants as partners, it is not sufficient to show that in a particular instance they have held themselves out as partners without further showing that the plaintiffs had knowledge of such fact, and gave credit on the faith of it. Plaintiffs in a certain case seeking to hold the defendants as partners, put in evidence, an agreement between the defendants and third parties to do certain work, in which agreement the defendants were named as partners. The suit was brought to recover the price of certain materials furnished by plaintiffs to defendants to carry on said work: *Held*, that the evidence was insufficient to establish a partnership between defendants, unless followed by proof that plaintiffs at the time they furnished the materials in question acted upon the faith of its recitals as to the existence of a partnership between defendants. *Denithorne v. Hook*, S. C. Pa., March 2, 1886, Weekly N. of Cas.

26. **PRACTICE.—Trial—Jury—What Papers may be taken to Jury-Room.**—It is not error to permit a jury to take to their room, when they retire to consider of their verdict, an itemized account used by counsel, and referred to, in the course of the trial, but not offered in evidence; proof as to the items of the account having been given, and the court having instructed the jury not to use it as evidence, except for the purpose of aiding the memory as to amount claimed by a party, should the jury find he was entitled to a verdict. *Ezrs. Rorer v. Rorer*, S. C. New Jersey, March 18, 1886, Atl. Rep.

27. ———. **When Objection for Want of Notice must be Made—Evidence.**—Claimant in an *in rem* proceeding against gaming implements, after appearing and pleading in the court below, cannot, for the first time in the Supreme Court, object that notice was not properly served. Evidence that the rooms in which the implements were found were resorted to, for unlawful gaming, prior to the seizure, tends to prove that at the time of seizure the implements were kept for use in unlawful gaming, and is competent. *Commonwealth v. Gaming Implements*, S. C. Mass., Jan. 23, 1886, New Eng. Rep.

28. **STATUTE.—Construction, Mandatory or Directory—Intoxicating Liquors—Forfeiture.**—Pub. St. R. I., c. 87, § 39, provides that the officer making a seizure of liquors "shall forthwith proceed to prosecute for the forfeiture thereof in the manner provided by law. In this case a little over three months elapsed between the seizure and the filing of the information. *Held*, that the direction in the statute is directory, and is intended to bring the question of forfeiture to a speedy trial, and to impose responsibility upon an officer for unnecessary delay. But the neglect of an officer to prosecute speedily, does not exempt liquors from forfeiture which are kept for sale in violation of law. The forfeiture depends upon the breach of the law, and not upon the diligence of the officer. *In re Liquors of Hoxie*, S. C. Rhode Island, Jan. 30, 1886, Atl. Rep.

29. **TRUST—Acceptance—What Will be Treated as an Acceptance.**—(Acceptance of trust express or implied). Acceptance of a trust, created by will, deed, or other instrument, is ordinarily presumed, and it is not required to be in writing, nor manifested by express words, but may be inferred from interference with the trust property, or acts, done in performance of the duties of the trust.

Any voluntary interference with the trust property will be held an acceptance, unless it can be plainly referred to some other ground of action; the *onus* being on the trustee to show this and every doubt being resolved against him. When a sum of money was bequeathed in trust, to be loaned out on bills of exchange or bonds secured by mortgage, the interest to be collected semi-annually by the trustee, and paid over to the beneficiaries; and the administrator of the estate made an arrangement with a mercantile house, of which the trustee was a partner, to supply the beneficiaries with goods on credit, to be paid out of the semi-annual interest as it accrued, and paid the accounts every six months, taking receipts signed by the trustee as such. *Held*, That the giving of these receipts showed an acceptance of the trust, notwithstanding the accompanying declarations of the trustee that "he would not accept the general trust," and the fact that the administrator represented that he only wanted a proper receipt to use as a voucher on his settlement. *Kennedy v. Winn*, S. C. Ala., December Term, 1885.—South. Law Times.

30. WILLS. — *Construction — Trust — Partition — "Upon the Death"*—*Intention*.—Where a testator directed, by will, that his estate should be held in trust for his children during a period of fifteen years, a clause therein that, "upon the death" of either of his children, leaving issue, the principal of such child's share should be distributed among his issue as he or she may appoint, did not conflict with the trust, nor accelerate distribution prior to the period of fifteen years thereof. *Conrow's Appeal*, S. C. Pa., Jan. 25, 1886, Atl. Rep.

#### QUERIES AND ANSWERS.\*

[Correspondents are requested to draw up their answers in the form in which we print them, and not in the form of letters to the editor. They are also admonished to make their answers as brief as may be.—Ed.]

##### ■ QUERIES.

42. July 3, 1881, P. bought a threshing machine of S. for \$300. to be paid for, in three equal annual payments, and agreed verbally to give S. his promissory notes for the same within a reasonable time. July 9, of the same month S. delivered the threshing machine to P. at his request, but P. never gave the notes as agreed. August 1, 1885, S. commenced suit against P. who pleads the statute of limitations. Under our law an account outlaws in 4 years and a note in 5 years. Is the plea of the statute of limitations good? what is meant by a reasonable time? cite authorities. Under the circumstances as stated in this case, is the time from July 3, to August 1, more than a reasonable time?

Daniel City, Neb.

J. W. M.

##### ■ QUERIES ANSWERED.

Query 21. [21 Cent. L. J. 323.] "On July 1, 1884, I promise to pay G. Jarlism or bearer, fifty dollars without interest. Jno. Smith."

What interest, if any, is collectable on the above note in September, 1885, in Iowa?

*Answer.* The general rule of law, no doubt applicable in Iowa, is that the note described would bear the statutory rate of interest from the date of maturity until judgment, *Southerland on Damages* vol. 1 p. 596.

If the statutory rate was changed in the meantime, the calculation of interest upon the note in question

would change, to conform to the new statute. Same authority, p. 666 and 673. See also text and cases cited p. 549.

Chattanooga, Tenn.

H. M. Wiltse.

#### CORRESPONDENCE.

*To the Editor of the Central Law Journal:*

In 19 Cent. L. J. 98, I propounded a question, which was answered, *Ib.* 359, as to whether interest was to be computed during the three days of grace on a note drawing interest from maturity. It is important in this State, at least it was, in the case which suggested the query, as determining jurisdiction. The Supreme Court of Mississippi last week decided the question in case of *Wheeler v. Watson*, also a case where the point was jurisdictional. I clip from a newspaper the following decision by the court:

*Held*, on a note made payable on a certain day and bearing interest after maturity, interest begins to run on the day named, although, for the purposes of suit the note does not mature until the expiration of the days of grace. *Weems v. Ventress*, 14 La. Ann. 267. Affirmed. (To be reported.)

LAYMAN.

Brookhaven, Miss.

#### RECENT PUBLICATIONS.

POEMS OF THE LAW. Collected by J. Greenbag Croke, Editor of "Lyrics of the Law." San Francisco: Sumner Whitney & Co. 1885.

This book, which is handsomely gotten up, has printed upon its cover the words, "Legal Recreations." By this we suppose is meant, recreations for lawyers. Recreation is emphatically a matter of taste, and as tastes differ so widely, it would be presumptuous in us to pronounce upon the merits of the volume as a book of amusement. It may be very entertaining to others, but we must say that, whether from some peculiarity of taste, or for some other reason, it has failed to interest us.

PRINCIPLES OF CRIMINAL LAW. By Seymour F. Harris, D. C. L. M. A. (Oxon). "Author of a concise digest of the institutes of Gains and Justinian." Third edition, revised by the author and Aviel Agabeg. With additions and notes adapting it to the American Law. By M. F. Force, Professor of Equity and Criminal Law in the Cincinnati Law School. Cincinnati: Robert Clarke & Co. 1885.

This is a new edition of a work of approved merit on a subject of great importance. It is of reasonable length, and not encumbered, like many other text books, with undigested masses of verbiage, that merely swell the bulk and inflate the price. The arrangement is very good. The first book treats of crime in general, of its essentials, of the persons capable of committing, and of those who do commit it, as principals and accessories. The second book of the first part treats of offenses of a public nature; those against the law of nations, such as piracy; those against the government, as treason, sedition, counterfeiting and similar crimes; offenses against religion, blasphemy, etc. The chapter on this subject is very short, and, it may be remarked, has not a single American annotation. The succeeding chapters treat successively of offenses against public justice, against public trade, against public mor-

als, health, and good order. This, the first part of the second book, includes all the offenses that can be committed against the public, the immediate and direct effect of which, impairs some public general interest, not those which have the personal and limited effect of injuring individuals in their persons or property. This latter class of offenses form the subject of the second part of the second book, and includes every variety of offense directed against individuals, ranging from homicide to petty larceny. The third book is devoted to criminal procedure, and in twenty-four chapters treats of all the stages of criminal procedure, from arrest to execution.

This sketch of the scope of this work is given, that it may be seen how broad is the ground which it covers, and how perfect is the subdivision of the topics treated. We have already said that the book is small (less than five hundred pages); it is rather to be regretted that it has not been made larger by the American editor, who, although he has done much to adapt it to the uses of the profession in the United States, might, perhaps, in an additional hundred pages or so, have added materially to its usefulness. However, much can be done by authors of the right kind within five hundred pages, and Dr. Harris beyond the seas, and Mr. Force on this side the water, are very clearly authors of that description. We think the book deserves the approval of the profession, and have no doubt it will receive it.

**LECTURES INTRODUCTORY TO THE STUDY OF THE LAW OF THE CONSTITUTION.** By A. V. Dicey, B. C. L., of the Inner Temple, Barrister-at-law, Vinerian Professor of English Law; Fellow of All-Souls College, Oxford, Hon. L. L. D. Glasgow. London: Macmillan & Co. 1885.

This is an able and scholarly exposition of the leading principles of the English Constitution as it stands to-day. This we all know is essentially different from the Constitution as it stood a hundred years ago, when Blackstone's commentaries so clearly delineated the form of government which then ruled England; and of course differs yet more widely from the English Constitution under the Stuarts and the Plantagenets. The idea of a Constitution as usually understood on this side of the water, is a code of law superior to the ordinary law making power and obligatory upon it. The English idea is very different. There Parliament, (King, Lords, and Commons), is supreme, and while it is unlimited in matters of the most vital importance, it is the ordinary law-making organ of the government and can, in a proper case, descend to the most petty details of legislation.

To the American mind imbued with the ideas of constitutional restrictions upon the action of the Executive, Legislative and Judicial departments of the Government, it would seem a contradiction in terms to speak of constitutional law, as at all applicable to a government in which the ordinary law-making power is sovereign, and, in a merely human sense, omnipotent. That Parliament is obliged to do anything, or omit anything, can hardly be averred in the face of the conceded fact that the power of Parliament over any pre-existing rule supposed to limit its action, is as complete and perfect as is its power to enact the most commonplace and trivial of statutes.

How a body, which by the very first principles of its existence is sovereign and supreme, the very fountain of all law, can be, nevertheless, restricted by limitations which circumscribe its action, is one of the numerous anomalies of the English form of constitutional government. That such limitations exist, and that they are sufficiently numerous and important to form a system of constitutional law is, of course, well

known, and the principles of that system are well set forth in the work before us.

It is composed of eight chapters. The first of which, treats of constitutional law in general, and in it appears the great difficulty of attributing to an unwritten system the qualities of a constitution. On page 22 the author says: "For at this moment a doubt occurs to one's mind which must more than once have haunted students of the constitution. Is it possible that so-called 'constitutional law' is in reality a cross between history and custom which does not properly deserve the name of law at all. \* \* \* Can it be that a dark saying of DeToqueville's 'the English Constitution has no real existence,' (*elle n'existe point*), contains the truth of the whole matter?" Passing over this doubt without, however, answering the question he had asked, or laying the ghost he had raised, he proceeds to assume that there is such a thing as constitutional law in England as used in England, and divides it into two classes: "Rules which are true laws—law of the constitution; and rules which are not laws—conventions of the constitution." Of the first class he gives as an example, "the king can do no wrong;" of the second, the rule that "the king must assent to, or cannot veto, any bill passed by the two houses of Parliament." Having passed safely over the threshold and reassured himself as to the reality of his subject, he stands on firmer ground in treating, in his second chapter, of the sovereignty of Parliament. This, at least, is a fixed fact, and there is no further hesitation. Time and space will not permit us to follow this author further, which we would very much like to do, for his subject is very interesting, and his style of treating it very good. We cordially recommend the book to the profession.

### JETSAM AND FLOTSAM.

**GOOD ADVICE WELL FOLLOWED.**—Perhaps our readers have heard this story before; for fear they have not, we will tell it now.

A man without money, and without friends was once arraigned in a trial court for a felony. As he had no counsel, the court, in accordance with the usual practice, assigned him as counsel, one of the fledglings of the law, who was, however, not as great a fool as he looked. To the youngster the judge said encouragingly: "Mr. —, take the prisoner into the vacant jury room across the hall, confer with him, hear what he may choose to tell you, and give him the very best advice you can." Client and counsel accordingly retired to the jury room, and, after considerable delay the lawyer strolled deliberately back into the courtroom. "Where is the prisoner?" asked the judge, in some perturbation of spirit. "Why, your Honor," replied the counsel, "you see, from what he told me, I thought he had a mighty poor show here, and so, as your Honor directed me, I gave him the very best advice I could, and that was, to jump out of the window and scoot; and I reckon that by this time he is about a mile, or (musingly) a mile and a half, or maybe two miles from here."

**INJUNCTION—NOVEL USE OF THAT PROCESS.**—It appears that in France, they have found a new use for the Gallic equivalent of the Anglo-Saxon writ of injunction. Within the last few days as we learn from an enterprising daily paper, a most remarkable legal procedure took place in Paris. It seems that M. Magnier

has fought recently several successive duels, and had made all the necessary arrangements to fight another with M. Thomegevik. The cablegram which transmits this intelligence adds: "But the long expected combat was prevented by an incident, it is believed, without precedent in the annals of dueling, namely, by a writ to stay proceedings issued by the Paris tribunals, and severed by the sheriff, just as he was leaving his apartment, with his second and a surgeon, for the battle ground. The writ prevented the duel and has caused a Parisian sensation. It was issued at the instigation of M. Tavernier, one of M. Magnier's former seconds, and was worded as follows:

"Adolph Tavernier, Homme de Lettres, summons M. Thomegevik, homme a Epee, not to fight a duel with M. Magnier, because M. Tavernier, well knowing the courage and the skill of M. Thomegevik, and fully aware that M. Thomegevik is firmly resolved to kill M. Magnier; and, whereas, the said M. Magnier is indebted to M. Tavernier for 8,000 francs, not including carriages and miscellaneous expenses consequent on M. Magnier's duel with the Comte de Dion; and, whereas a tragic result would be probable, and in which case the debt due to M. Tavernier would perish, together with the life of the debtor; it is herewith enjoined that no duel between M. Magnier and M. Thomegevik do take place until the financial situation, between M. Magnier and M. Tavernier be liquidated.

Such is the purport of the writ stripped of its technical phraseology, and which has thus brought the complicated machinery of the French law into play. This is the first time so far as we know that the "powerful instrument," as a Lord Chancellor of England once denominated the writ of injunction, has been used as process under the code of honor. The only parallel case within our recollection is that of a faithful and zealous Life Insurance agent, who swore out a peace warrant against two disputants who, it was apprehended, were about to engage in one of those impromptu and informal duels known in the South as a "difficulty" or a "street fight." The only reason for his intervention was that, one of the combatants was insured in the agents company.

**WHOLESALE OR RETAIL.**—The question was recently raised whether a thief steals goods at retail or by wholesale; upon a trial for larceny it appeared in evidence that, the value of the booty if estimated at the current wholesale prices of the commodity, was a trifle below the pecuniary limit, which divides grand from petty larceny. At the customary price of the article when sold at retail, the value considerably exceeded that limit. The difference was very material to the prisoner, for petty larceny could be punished by imprisonment for six months, whereas grand larceny entitled the convict to a sojourn of two years in the State Prison. The jury was puzzled and asked for further instructions. The judge told them, that if they were satisfied as to the guilt of prisoner, they should charge him the highest price for the goods that the evidence would warrant, that it was not the usage of any branch of trade to give favors in the way of rebates, discount, or special rates to customers of his description.

**A BALANCED MIND.**—A juror summoned to try a charge of murder, and examined on the *voir dire*, gave the following answers: "If the evidence showed the defendant guilty, my verdict would be to hang him. If it showed clearly that he was innocent, I should be in favor of discharging him. If the evidence for him and against him was so nearly equal that I could not determine which was the stronger, I would render a verdict of guilty of murder in the second degree." He was not seated.—*Ohio Law Bulletin.*

**A LEGAL FOG.**—It was of a case in the United States District Court at Albany many years ago. A patent right suit was brought on before Judge Nelson. William H. Seward was counsel on one side. In summing up he occupied a whole day. Peter Cagger came in while he was talking, and after listening an hour turned to a learned lawyer and inquired: "What the deuce is 'Bill' Seward talking about?" The counsel on the other side made a long speech, and the judge charged the jury. After the jury had been out about two hours they came in court, and the foreman said: "Your Honor, the jury would like to ask a question." "You can proceed." "Well, your Honor, we would like to know what this suit is about?"—*N. Y. Law Jour.*

**BREWSTER, Q. C.,** afterwards Chancellor, addressing a jury, was reported to have said: "My client was not to be daunted! He took a defiant course! He took the bull by the horns, and indicted him for perjury." This was indeed a bull.—*Ibid.*

**A CORRESPONDENT WRITES:**—"Let me tell you a semi-theatrical story, which I do not think has ever been in print. When I was a boy I used to go to the office of an eminent firm of solicitors, the head partner in which used to give me tickets for the theatre. One day he asked me if I would like to see Charles Matthews. I replied in the affirmative. 'Well,' he said, 'I'm just sending a writ up to him, and I'll ask for a ticket for you at the same time.' I returned in the afternoon, and my friend handed me a pass for the theatre, and at the same time gave me Charles Matthew's letter which accompanied it. The letter ran: 'Dear Blank,—Herewith the ticket for which you have writ.'"  
—*Irish Law Times.*

**TRIAL BEFORE A JUDGE.**—Mr. Justice Cave found himself in a comical predicament last week. His lordship had tried a case in which the evidence had mostly been taken abroad on commission, and in finding the facts, he had to make his choice between three or four depositions on one side to one state of facts, and an equal number on the other side to a state of facts precisely opposite. Having neither intrinsic nor extrinsic evidence to guide him to the truth, the learned judge very naturally found himself unable to come to a conclusion. In other words, the jury part of him as his lordship humorously expressed it, was unable to agree, and had therefore to be discharged without giving a verdict. This incident of trial by jury has hitherto been supposed to be absent from trial by judge—perhaps because it is not every judge who, when he finds a difficulty in making up his mind, has also the courage to confess it.—*Law Times.*

**YOUNG ATTORNEYS.**—There are few terms which leave more to the imagination than this. Youth suggests energy, ambition, zeal, push, and many of the strong points in an able lawyer. It also runs with the idea of moderation in charge, and a certain devotion to the interests of the client which, unfortunately, an unsuccessful lawyer or a half-successful lawyer is likely to lose, as he becomes more cynical and soured than he was at the start. But the term is deprecated by some who do not realise the vital importance of these strong points, because it implies limited knowledge, inexperience, and want of confidence, or what is far worse, display of quite unnecessary knowledge, a pride of partial and one-sided experience, and a sort of freshness, in being soft and effecting to be very hard. We are inclined to the belief that clients generally think very well of a young attorney, provided the young attorney does not think too well of himself, and if he is shrewd enough to protect his yet immaturity of knowledge by quietly taking counsel—a process very much like what the underwriters call re-insurance. He who is asked to advise can always find guidance how to advise, if he seeks it; and from his own knowledge of his client, advice thus aided or reinforced is often more useful to the client than counsel from an older lawyer who is a stranger.—*Kentucky Law Reporter.*